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LAW 2013/05

Department of Law

European Regulatory Private Law Project (ERC-ERPL - 05)

European Research Council (ERC) Grant

Dimensions of Self-Sufficiency

Yane Svetiev



European Research Council
Established by the European Commission

European University Institute

Department of Law

“European Regulatory Private Law” Project

European Research Council (ERC) Grant

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EUI Working Paper **LAW** 2013/05
ERC-ERPL Project – 05



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ISSN 1725-6739

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation (ERPL)

A 60 month European Research Council grant has been awarded to Prof. Hans-Wolfgang Micklitz for the project “European Regulatory Private Law: the Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation” (ERPL).

The focus of the socio-legal project lies in the search for a normative model which could shape a self-sufficient European private legal order in its interaction with national private law systems. The project aims at a new-orientation of the structures and methods of European private law based on its transformation from autonomy to functionalism in competition and regulation. It suggests the emergence of a self-sufficient European private law, composed of three different layers (1) the sectorial substance of ERPL, (2) the general principles – provisionally termed competitive contract law – and (3) common principles of civil law. It elaborates on the interaction between ERPL and national private law systems around four normative models: (1) intrusion and substitution, (2) conflict and resistance, (3) hybridisation and (4) convergence. It analyses the new order of values, enshrined in the concept of access justice (Zugangsgerechtigkeit).

The research leading to these results has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP/2007–2013) / ERC Grant Agreement n. [269722].



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Abstract

This working paper addresses two dimensions in which transnational or supranational regulatory regimes may be regarded as self-sufficient, providing some reasons, limits and pitfalls from such a tendency. The focus of both parts is on competition policy, which is of particular importance because of its transversal character: the fact that it can be applied in many if not all markets means that competition policy is a useful tool for market opening/integration and is likely to create conflicts with different policy objectives pursued in various market settings. Moreover, competition policy often acts as a trump on ordinary private law principles and can be used by administrative actors to substantially re-order private relationships.

The first section focuses on the regulatory network and the idea of its self-sufficiency as a regulatory club for the self-enforcement of commonly agreed-upon norms independent of any formal mechanism for enforcement or dispute resolution within the network. As such, national regulators may develop obligations qua club members, distancing themselves from national communities. Yet the paper seeks to show that even informal enforcement requires mechanisms for making the actions of national administrations observable and characterisable. While mechanisms that perform that function have been observed in some EU networked regimes, these can be used either to enforce a hierarchical EU intrusion into national legal orders or to stimulate learning from divergent approaches stemming from persistent heterogeneity within the EU; it is an empirical research question to determine which is a better characterisation of the networked regulatory regimes.

The second section focuses on self-sufficiency by way of a narrow definition of the policy mandate of legal and regulatory regimes, i.e. the idea of the instrumentalisation of a branch of the law for the achievement of a particular policy objective. This type of mandate definition can have a number of advantages: concentrating on a narrowly defined mandate can increase the likelihood of achieving it, it can allow for the proper sequencing of different policy tools where some objectives need to be prioritised and in a multi-level environment it can allow for the allocation of policy tools to different levels. Yet, by reference to the relationship between competition policy and social policy objectives, the second part highlights some of the risks involved in building such self-standing regimes, including the development of rationalities and institutional habits that are difficult to dislodge even in the face of absence of success in achieving (or better yet trading off) the myriad objectives of public policy.

Keywords

regulatory networks, private law, informal enforcement, competition policy, social objectives, development, self-sufficiency

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INTRODUCTION

*Yane Svetiev**

There is little dispute that EU law has increasingly sought to directly regulate relationships between private actors in advancing integration and other objectives leading in turn to a body of law that has come to be recognised as European private law. In considering the relationship between this new body of law and traditional national private law, one possible scenario is that EU private law emerges as a largely autonomous body of norms, operating relatively independently from national private law and its institutions. One possible reason for such a development might be the sometimes quoted principle of procedural autonomy of the Member States, which in turn leads to considerable diversity in their private law regimes and institutions. By contrast, even in its private law dimension, EU intervention increasingly relies on the national administrations. In fields such as competition (which is transversal and particularly important in the networked services sectors), telecommunications, energy, food safety, financial market regulation and others, rather than expanding the reach of the Brussels bureaucracy we observe the networking of national administrations, together with the Commission.

The emphasis on the creation of regulators, networking those regulators across state boundaries and an expanding role of such administrative bodies in steering private relationships (between incumbents and entrants or between suppliers and consumers for example) in various markets could suggest an erosion of the autonomy of the Member States and their own private law (which is presumed to be democratically legitimated) and an erosion of private party autonomy which traditional private law sought to facilitate. Moreover, such a development could also lead to the emergence of a self-standing European private law for at least two reasons, each of which is explored in the following two sections of this paper.

The first reason is that the joining of the national administrations together with the Commission in EU networks can provide an alternative mechanism for the enforcement of EU norms, which is certainly procedurally less onerous and less costly compared to enforcement proceedings before the EU courts, where a Member State fails to implement the formal obligations of EU law. Further, making distinctions as between national legal systems or suggesting that national courts or judiciaries provide inadequate legal protection for EU law rights is politically much more challenging and sensitive for the EU institutions. While most of the EU networked regimes do not have formal enforcement mechanisms through which the national administrations can be disciplined, this does not necessarily mean that other mechanisms for enforcement could be effective in these regulatory clubs. Slaughter, in her seminal analysis of transnational regulatory networks, has suggested that informal mechanisms of enforcement, such as reputation, ostracism or socialisation could be operative and more effective among members of such networks¹.

The first part of this working paper seeks to examine the extent to which the various informal mechanisms, following the taxonomy provided by Jon Elster², are likely to emerge in the context of a transnational regulatory network to ensure the enforcement of common norms. The conclusion is that none of the informal mechanisms offered by Elster is likely to be particularly effective in the regulatory network context, not least because of the absence of mechanisms for making the actions of participating administrations observable and characterisable to the rest of the membership. Moreover,

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¹ Slaughter, 2004, *A New World Order*, pp. 196-203.

² Elster, 2009, 'Norms' in Hedström/Bearman (eds), *The Oxford Handbook of Analytical Sociology*, p. 297.

such mechanisms are necessary both to ensure effective learning across different network members or, for that matter, for an effective mechanism of formal norm enforcement.

It is worth noting that in the EU context, we can observe some formalisation of mechanisms for the observability and characterisation of the activities of national regulators to all network members. Thus in the ECN context, as I have pointed out in prior work³, there has been formalised a mechanism for the reporting of cases pursued under EU law to the ECN. Furthermore, we observe the creation of network bodies of peer review in which the actions of the member bodies can be discussed and characterised vis-à-vis the common norms. As the first section of this paper illustrates, however, such mechanisms can have multiple rationales and effects (and the latter need not coincide with the former). They can indeed be used both for the hierarchical imposition of norms (thus contributing towards the emergence of a self-sufficient EU regulatory private law), but they could also be used for mutual learning, where the administrations are allowed considerable autonomy in crafting their enforcement activity and how they involve private parties in such activities (where EU norms emerge through a more bottom-up process to which national administrations and even courts are active contributors). Which one of those scenarios is a better characterisation of the process is precisely one important question that should be the subject of the empirical research.

There is a second way in which the networking of the national administrations together with the Commission can lead to the emergence of a self-standing EU law, including in its private dimension. Specifically, this can be the result of a narrow definition of the mandate of European regulatory interventions, which in turn is then “internalised” in the decision-making and analytic procedures of the national administrations. The second section of this paper analyses precisely the problem of the narrow instrumentalisation of regulatory mandates in transnational or supranational regimes. One reason for such a narrow definition of the mandate can be that of sequencing: the idea that one particular goal is more important than another and that regulation pursuing the second goal should await the achievement of the first. In the EU we can observe such a tendency, where for example it is often argued that EU interventions have a neoliberal flavour because the EU prioritises the achievement of the internal market objectives (through fostering cross-border competition) vis-à-vis other regulatory objectives (such as, most prominently, social objectives where any joint action was delayed for a later stage of integration, in an interesting inversion to the suggestions of some development economists in the example from the transnational context discussed in the second part of this working paper). In the EU such narrow mandates can also be underpinned by subsidiarity concerns: certain types of policy are to be pursued at the national level both because this is part of the EU constitutional bargain and because policies promoting social objectives are more legitimately put in place by the national democratically elected legislatures.

By using as an example the question of the appropriate sequencing for the implementation of competition policy vis-à-vis developmental and social goals in the transnational setting, the second section of this working paper examines some of the dangers inherent in the development of self-sufficient narrow mandate regulatory interventions. Specifically, building narrow-mandate bureaucracies could mean that jurisdictions are locked into a single strategy for the pursuit of specific policy objectives. This can be problematic if the strategy turns out to be wrong, such as if the narrow-mandate regulator completely misses a specific dimension of the problem. It can also be problematic due to the isolated silo effect, whereby the narrow mandate regulator ends up working at cross-purposes with a different regulator in charge of a different regulatory task or objective. Furthermore, narrow definition of the regulatory objectives can lead to the emergence of organisational habits, in the way of decision-making and analytic procedures, that are particularly difficult to dislodge. Thus, the single-headed pursuit of the goal of cross-border competition can lead to procedures that effectively pursue that (intermediate) goal, while at the same time leaving in the bureaucratic blindspot the overall

³ Svetiev, 2010, ‘Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?’ in Sabel/Zeitlin (eds), *Experimentalist Governance in the EU: Towards a New Architecture*, p. 114.

goals of public policy. Similarly, industrial policy in support of domestic champions can both leave domestic markets at the mercy of monopolists or can effectively eliminate all sources of independent learning needed to assess the efficacy of such policies vis-à-vis the overall public interest. This kind of implementation can lead precisely to the development of a specific “rationality” of a legal or administrative regime, and at the same time denying the regime the capacity to overcome even in the face of overall failure. This kind of implementation can also produce a strong form of, what the literature has termed, “diagonal conflict” cases⁴, while at the same time the regulatory silos can prevent the effective proceduralisation and accommodation of such conflicts.

Again, coming back to the EU context this issue is particularly important. If indeed EU interventions, now also intruding deeply into horizontal private relationships, have a narrow mandate and a specific rationality and if such a rationality is now ensnaring national actors and institutions, this can have particularly deleterious consequences as it extinguishes the tools for the pursuit of a diversity of public policy objectives at the altar of liberalisation. Thus it has been suggested that the self-sufficiency of European Regulatory Private Law may act in a “dystopian” way⁵. In that context, the fact that the negative integration objectives were prioritised and were to be sequenced before other objectives, such as social ones, could lead to pessimism about the capacity of European institutions to disrupt this self-description of their mandate to pursue a more balanced set of policy objectives. This is at least one common characterisation of a raft of recent private law decisions of the ECJ on the balance between the (negative) economic freedoms and the protective provisions of national labour law. And competition policy, discussed in this part, is particularly important in this interpretation as it was used as one of the principal instruments for promoting market integration via cross-border competition and distribution.

Again, however, the situation is more complex and the question whether EU private law is self-sufficient in its definition of its “rationality” is a question that requires empirical research. There are at least two pieces of evidence suggesting that the view of EU intervention as having a neoliberal rationality may be too narrow. One is in the area of competition law and state aid, where EU institutions have already demonstrated a capacity to go beyond the narrow pursuit of cross-border competition to a more encompassing definition of the objectives of competition policy to include complex goals such as innovation. The state aid component of competition policy goes perhaps even further in identifying broader legitimate goals of government policy, while offering Member States and EU institutions procedural tools for gauging the achievement of such goals. Similarly, in the design of the networked regulatory regimes for the public utilities, such as energy or telecommunications, we see the incorporation of the objective of consumer protection into the overall mandate of those regimes⁶. Perhaps this reflects the growing recognition that the process of liberalisation was not one some simple idea of “unleashing” competitive market forces, but in fact was and continues to be a process of the design of markets that both tap into and constrain the autonomy of private actors in ways that promote some broad conception of the public interest. Such a recognition can be liberating, in that it dislodges the focus on the intermediate objectives (liberalisation) in the hope that this produces good outcomes for business and consumers, and refocuses attention on the

⁴ Eg, Joerges/Schmid, 2010, “Towards Proceduralization of Private Law in the European Multi-Level System“, in Hartkamp et al (eds) *Towards a European Civil Code*; Schmid, 2000, “Diagonal Competence Conflicts between European Competition Law and National Law: The example of book price fixing”, 8 *European Review of Private Law*, vol. 8, pp. 155-172.

⁵ See Zeitlin, 2012, *Comments on Self-sufficiency in Micklitz/Svetiev (eds), A Self-sufficient European Regulatory Private Law – A Viable Concept?*, ERPL WP-1.

⁶ Svetiev, 2012, “W(h)ither Private Law in the Face of the Regulatory Deluge” in Micklitz/Svetiev (eds), *A Self-sufficient European Regulatory Private Law – A Viable Concept?*, ERPL WP-1.

specific features that can be incorporated into the market design⁷ to ensure a more balanced pursuit of the interests of various market participants.

⁷ Used here in the way attributed to some Ordoliberals, see Joerges, 2006, “La constitution économique européenne en processus et en process”, *Revue Internationale de Droit Economique* XX(3): 253; Colliat, 2012, “A Critical Genealogy of European Macroeconomic Governance”, *European Law Journal* 18(1): 6, 7-8.

I. SELF-SUFFICIENCY AS INFORMAL ENFORCEMENT IN THE REGULATORY NETWORK^Δ

Introduction

Regulatory networks increasingly populate the European regulatory landscape. In various both horizontal enforcement regimes (such as competition or antidiscrimination) as well as vertical sectoral regimes (telecommunications, energy, food safety, financial services) we observe the creation of EU networks encompassing the national regulatory agencies and sometimes incorporating also the European Commission (as in the case of the competition network for example). While some aspects of the networks are formalised and sometimes the network bodies are given certain formal powers (limited of course by the Meroni doctrine), much of their operation proceeds through consultation and discussion, taking place in issue-based working groups and beyond the radar screen.

Similarly, a key aspect of the shift towards informal mechanisms for elaborating and enforcing international legal norms has been the proliferation of transnational regulatory networks (TRN) in various policy fields. Such networks have been formed in preference to traditional regimes based on international treaties and organisations in charge of enforcing them, and they have been formed with respect to many different regulatory and enforcement issues at both the regional and global levels. In fact, precisely because of their informal character and because they do not follow a particular pattern or template either for their organisation or for the mechanisms through which they operate, it is said to be impossible to provide an exhaustive list of such transnational networks in existence at any particular point in time.

Given this trend observed over the past few decades, a number of scholars have explored the reasons for the formation of such networks and have sought to provide at least a preliminary assessment of these new instruments compared to more traditional tools of international law.

In particular, in her seminal contribution, Slaughter argued that the networked regimes were an improvement on the standard toolkit for international cooperation and that transnational networks provide the construct for the ‘new world order’.¹

Moreover, in this and other early contributions, she argued that networked regimes had the potential to deliver a more effective, legitimate, and just world order compared to the standard treaty/organisation paradigm. Other scholars also examined the operations of some networked regimes and provided evidence that despite their informality, their distance from elected politics and the absence of formal enforcement mechanisms, TRNs were capable of delivering satisfactory levels of cooperation, compliance, and policy outcomes.²

However, both in light of the optimistic tenor of the early literature and the fact that these types of transnational fora have since proliferated even more rapidly at all levels of a multi-level world, more recent scholarly interest has shifted towards evaluation of TRNs and understanding precisely the kinds of outcomes that these networks deliver both at the international and the local level. Apart from providing an occasion for international travel and mutual interaction for the officials involved, do TRNs serve any useful public interest? Do they contribute to the elaboration and implementation of international norms and are such norms effective and legitimate? And even if not, do they serve some

^Δ A revised version published as “The Limits of Informal Law-Making: Enforcement, Norm-generation and Learning in the ICN”, in *Informal International Law-Making* (Joost Pauwelyn, Jan Wouters & Ramses Wessel, eds., Oxford University Press, 2012).

¹ Anne-Marie Slaughter, *A New World Order* (Princeton University Press, Princeton 2004).

² Eg, Kal Raustiala, ‘The Architecture of International Cooperation’ (2002) 43 *Virginia Journal of International Law* 1, 3-9.

other public enhancing purpose either for the domestic publics of the regulatory agencies or for the international community as a whole? One aim of such inquiry might be to answer the question whether these networks are worth the trouble and expense of their formation and ongoing maintenance. Moreover, even if we think that either a return towards the classical (treaty/organisation) model or a lurch towards a global State is unlikely, this type of inquiry may provide guidance on how to improve the architecture of such networks so as to enhance their efficacy and legitimacy by identifying network features and architectures that work better than others.

This paper stems from a more substantive effort to examine and evaluate the modes of cooperation of the International Competition Network (ICN) with the view of working towards a framework for the evaluation of TRNs more broadly. The ICN is a broad-based network open to all competition (or antitrust) enforcement agencies around the world.³ From the perspective of assessing the challenges of informality in the ‘new’ international law, the ICN provides an interesting case for a number of reasons. First, the ICN came into existence and held its first meeting in 2002, after the failure of numerous attempts over the course of the 20th century to develop an international antitrust instrument by way of a treaty. In light of such failures, and in light of the fact that no consensus could be reached for even a minimal harmonisation of competition rules as part of the Doha Round of WTO negotiations, the ICN was from the outset and very deliberately a highly informal and unambitious network.⁴ It was to have a minimal infrastructure, it is peripatetic (with no permanent seat), it has very few rules of engagement, and any object of developing an antitrust code for the world was categorically disclaimed at its conception.⁵ As a result of these features, we might regard the ICN as belonging at the highly informal end of the spectrum of formality of TRNs in every dimension identified in the framing chapter of this volume. It bears noting at this point that the mere fact that the ICN is informal and unambitious does not insulate it from evaluation of either its efficacy or accountability. This is particularly so given that the ICN does have some normative ambitions to guide and influence the conduct of its members. Specifically, the ICN aims to ‘formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure’ and to ‘encourage the dissemination of antitrust experience and best practices, promote the advocacy role of antitrust agencies and seek to facilitate international cooperation’.⁶ However, the adoption of the norms elaborated in the ICN context is not assured via legal means, instead, ‘where ICN reaches consensus on recommendations ... it will be left to the individual antitrust agencies to decide whether and how to implement’ them. In other words, the compliance with the norms elaborated within the ICN could be assured by virtue of their persuasiveness to the membership and without (ICN) legal means.

In seeking to provide a framework for evaluation of such a highly informal network, this contribution proceeds in a few distinct steps. First, we begin with the question whether, as had been argued by Slaughter, we are likely to observe the emergence of the informal tools of maintaining cooperation and norm-compliance in the context of the ICN. Secondly, for a network such as the ICN a focus merely on the emergence of alternative norm-enforcement mechanisms may be too limited. This is because the ICN was not formed with a background set of commonly agreed-to competition rules or norms, and instead has an explicit learning and exchange objective, with one, if not the key aim being to enhance implementation knowledge and capacity of the agencies and officials of emerging antitrust

³ The Memorandum on the Establishment and Operation of the ICN (ICN Establishment Memorandum) provides no restriction on membership, other than the requirement that ‘[m]embers are national or multinational competition agencies entrusted with the enforcement of antitrust laws’ <<http://www.internationalcompetitionnetwork.org/uploads/library/doc579.pdf>> accessed 10 November 2011.

⁴ The ICN Establishment Memorandum describes the ICN as ‘project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest’. (n 3).

⁵ The ICN Establishment Memorandum explicitly provides that the ICN will not ‘exercise any rule-making function’ (n 3).

⁶ (n 3).

jurisdictions. To fulfil this objective, within the ICN we have observed the formalisation of certain tools of learning or knowledge transfer. While I argue that this is preferable to relying merely on unstructured learning and exchange, the chapter ends with some words of caution about how the architecture of knowledge and norm-building is formalised in the ICN, which are likely to apply to other TRN settings as well.

Informality: Advantage or Challenge for the Networked Orders

In her analysis of the potential of TRNs as a tool for international cooperation and as a basis of a new world order, Slaughter did not treat their informality as an obstacle. Quite to the contrary, the less formal character of such networks offered a decided advantage compared to the negotiation of treaties and establishment of international bureaucracies to enforce the treaty rules, which is regarded as the gold standard of the enforcement of international law especially in the post-World War II period. This view is understandable given the usual experience of the glacial pace of treaty negotiation by diplomatic representatives, who tend to view every negotiating point through the prism of State interest trade-offs. Such an approach to negotiation has often meant that by the time a treaty with an acceptable set of norms could be agreed upon, the regulatory problems faced by the world may well have changed, leaving the regime largely dormant with any resulting international organisation being perceived as ineffectual. The international organisation could also be ineffectual if staffed by national diplomats who view every issue as an occasion to assert or trade-off national interests, rather than through the prism of resolving concrete regulatory problems.

The informality of networks as a cooperation tool, by contrast, provides the associated advantage of flexibility together with a degree of self-sufficiency. They could be formed in response to specific regulatory problems, by officials who have to deal with such problems on a day-to-day basis and without pre-existing agreement as to rules or rule-enforcement. To the extent that officials are technocrats or professionals, they might share a similar perspective and language that would make interaction and agreement easier to achieve⁷. Moreover, such interactions and the scope for cooperation would be enhanced by their focus on solving problems (win-win) rather than defending national interests (zero-sum).

Flexibility has an added advantage in the regulatory context if the problems faced by regulators are likely to change rapidly and unpredictably. In the antitrust setting, changing competitive strategies by firms or shifts in technology that alter market boundaries and bases of competition can easily undermine competition enforcement efforts. A less formal cooperation infrastructure is going to be less rigid and the focus, priorities, and rules would be easier to change in response to new problems or changed priorities.⁸ This reflects the fact that the more dynamic the world is that is the subject of regulation, the less likely is a regime of narrow rules, which are difficult to change or augment, to provide an effective response.

⁷ In the EU context see Hans-W. Micklitz, 'The Visible Hand of European Regulatory Private Law' (2009) 28 Yearbook of European Law 3, 55-56, also Hans-W. Micklitz and Dennis Patterson, 'From the Nation State to the Market: The Evolution of EU Private Law' (unpublished manuscript, 2012).

⁸ Thus, in the context of the European Competition Network (ECN), it has been observed that working groups can be formed as specific issues arise and dissolved when their purpose is fulfilled, which in turn suggests that a 'description of the ECN as it stands today, may ... be obsolete in a few months time'. Kris Dekeyser and Dorothe Dalheimer, 'Cooperation within the European Competition Network - Taking Stock after Ten Months of Case Practice' in Philip Lowe and Michael Reyonlds (eds), *Antitrust Reform in Europe: A Year in Practice* (International Bar Association, London 2005) 121.

Maintaining Cooperation through Informal Means

While its constitutive documents describe the ICN precisely as a ‘project-driven’ and ‘results-oriented’, as already pointed out they do not envisage any binding instruments through which to guarantee the cooperation of member authorities to either participate in joint projects, to stick to commitments made for the solving of specific problems or more broadly to adhere to emergent norms of best practices developed within the network. Yet Slaughter has argued that the absence of formal enforcement mechanisms as part of the TRN architecture, such as dispute resolution bodies that could identify and sanction non-compliance, does not necessarily mean that TRNs would not be effective vehicles for ensuring compliance with international norms. In particular, she pointed to a number of alternative mechanisms for the enforcement of norms and cooperation identified in the literature that do not rely on special bodies for dispute resolution and sanction and that may be transposed to the quasi-professional and self-sufficient group contexts of TRNs.⁹ For example, in their work, scholars such as Robert Ellickson¹⁰ and Lisa Bernstein¹¹ have identified mechanisms through which neighbours or groups of traders in an industry maintain cooperation and order without necessarily relying on formal mechanisms such as legal rules or courts. According to Slaughter, TRNs can rely on similar non-legal mechanisms such as withdrawal of cooperation, building of reputation, or socialisation to ensure cooperation and compliance with emergent norms informally.¹²

In evaluating the potential for informal mechanisms of cooperation within TRNs, it might be useful to begin with Jon Elster’s systematisation of such mechanisms. Legal norms are distinguished by Elster by the fact that they ‘depend on specialised enforcers’ who are charged with verifying norm compliance.¹³ Setting apart legal mechanisms, he distinguishes three modalities of self-enforcement within a group that could be applicable to ensure cooperation in the TRN context:

1. Cooperation could be maintained as between parties because the parties’ incentives favour continued cooperation (such as for example the notion of a repeated game equilibrium)¹⁴
2. Cooperation could be maintained due to the existence of social norms that parties are unwilling to violate because of the condemnation of such violation by other members of the group
3. Parties could maintain cooperative behaviour and follow norms for intrinsic reasons related to the parties’ own preferences (Elster refers to this mechanism as the following of a ‘moral’ norm¹⁵).

As we will see, in the context of the ICN (and likely also in the context of many if not most other TRNs), there are problems associated with the observability and characterisation of the conduct of national regulatory officials (or other relevant decision-makers) that present serious difficulties for the likely efficacy of all of the above informal modalities of maintaining cooperation.

⁹ Slaughter (n 1) 198-99.

¹⁰ Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard University Press, Cambridge 1991).

¹¹ Eg Lisa Bernstein, ‘Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions’ (2001) 99 Michigan Law Review 1724. The cotton industry regime described by Bernstein does include formalised institutions for enforcement and dispute resolution, but she notes, at 1762, that given the importance of the informal ties only a ‘small number of cases require (...) third-party adjudication’.

¹² Slaughter (n 1) 196-203.

¹³ Jon Elster, ‘Norms’ in Peter Hedström and Peter Bearman (eds), *The Oxford Handbook of Analytical Sociology* (OUP, Oxford 2009) 197.

¹⁴ (n13) 198.

¹⁵ (n13) 196.

Incentive Based Cooperation

A substantial literature, stemming in particular from the theory of incomplete contracts and industrial organisation, identifies circumstances under which agreements between parties can be self-enforcing, even in the absence of formal (external) means of resolving disputes and sanctioning non-compliance.¹⁶ The mechanism of informal enforcement identified in this literature is based on the parties' incentives in favour of continued cooperation stemming from the prospect of future dealings between them. A party will maintain cooperation and comply with common norms even in the absence of any formal enforcement mechanism because another party to the agreement can punish non-compliance by withdrawing future cooperation. As long as all parties in the group care sufficiently about the gains from cooperation in the future, the threatened punishment (if credible) will temper any short-term temptations to 'cheat' on their agreement by acting inconsistently with common norms.

As Gilson, Sabel and Scott point out further, in settings where there are multiple other entities whom each of the parties can deal with, the retaliatory punishment for non-compliance can also be effected through the party cheating on the norms developing a reputation for misbehaving. A bad reputation for cooperation will lead other potential counterparties to avoid dealing with the misbehaving party in the future as well, thus enhancing the incentive in favour of continued cooperation.¹⁷

Yet the operation of mechanisms for sustaining cooperation through the prospect of future dealings is substantially attenuated in the context of a regulatory network such as the ICN for a number of reasons. First, even with respect to the initial trigger for retaliation, in light of the fact that ICN norms are expressly identified as non-binding, it is not clear that failure to observe certain of the norms developed within the network would either be qualified as cheating or that it would lead to the creation of a bad reputation and the withdrawal of cooperation from other participants.¹⁸ In fact, in a number of interviews, discussed in more detail below, national officials indicated that after failing to persuade the ICN membership of the wisdom of their own domestic rules when formulating a common norm, within their own jurisdiction they continue to follow the domestic norm as more appropriate to domestic circumstances.¹⁹

Finally, it is not clear how in the ICN setting a withdrawal of future cooperation would be effectuated even if a failure to cooperate and/or observe an ICN norm is identified as cheating behaviour. In other words, it is not clear how in this context 'one member would "switch its business" to a member with a better reputation'²⁰. The ICN aims to be broad-based, it does not have provisions identifying criteria for admission into membership,²¹ nor does it provide for the exclusion from membership of a particular agency. Nor does the ICN have mechanisms for deeper engagement among some of its members that could induce members to cultivate a good reputation. Finally, the threat of withdrawal of

¹⁶ Eg George Baker, Robert Gibbons, and Kevin Murphy, 'Relational Contracts and the Theory of the Firm' (2002) 117 *Quarterly Journal of Economics* 39.

¹⁷ Ronald Gilson, Charles Sabel, and Robert Scott, 'Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice and Doctrine' (2010) 110 *Columbia Law Review* 1377, 1392-93.

¹⁸ Verdier, for example, has argued that 'the reputational costs of breach or withdrawal are smaller' with informal non-binding agreements since participants have signalled a lower level of commitment. Jean-Hugues Verdier, 'Transnational Regulatory Networks and Their Limits' (2009) 34 *Yale Journal of International Law* 113, 167.

¹⁹ Interview with Official of the Israel Antitrust Authority Official (Zürich 4 June 2009) (with respect to merger notification market share thresholds); Interview with Official of the Competition Commission of South Africa (Zürich 3 June 3 2009) (with respect to presumptions for firm dominance).

²⁰ Slaughter (n 1) 196-97.

²¹ While in the Operational Framework, adopted by the ICN members on 4 March 2011, para 2(iii) provides that '[a]ll applications for membership must be approved by the Steering Group', no criteria for the approval of applications or the exclusion of members are supplied. <<http://www.internationalcompetitionnetwork.org/about/operational-framework.aspx>> accessed 15 November 2011.

cooperation might not be credible and, as Slaughter recognises,²² may in any event be counter-productive since authorities that are perceived to be failing their obligations would be those most in need of continued engagement in the network.

Social and Intrinsic Reasons for Maintaining Cooperation

It may be argued that the incentive-based mechanisms for self-enforcement are more likely to sustain cooperation between profit-driven parties in commercial settings. By contrast, it would be more difficult to identify precisely the incentives for cooperation and the punishment strategies in a broad network of regulators such as the ICN. However, as we saw, there are other mechanisms for maintaining cooperative behaviour in groups, in the absence of formal compliance, that do not rely on the calculation of prospective gains from cooperation to each individual party as inducement. Such mechanisms are said to be 'normative' or 'dispositional'.²³ They are based on morality, or tastes for compliance or reciprocity by each individual party, or on the party's desire to avoid the opprobrium of its social group, even in situations where there may be a net gain from deviating from the arrangement.²⁴ In Slaughter's taxonomy, this might correspond to enforcement through 'socialization'.²⁵ An individual member will continue to behave in a cooperative way and not contravene established group norms either out of fear of social condemnation by group members (what Elster calls 'social norm' enforcement through the sanction other group members impose when observing norm violators²⁶) or because the norms become so ingrained that they have become constitutive of the group members' identity (what Elster refers to as 'moral norms', which an agent would follow even in the absence of observation or sanction by group members).

Again, if we consider the make-up and modalities of interaction of a TRN such as the ICN, we might be somewhat sceptical about the likelihood that these alternative forms of norm enforcement would be likely to emerge and ensure continued cooperation at the supranational level.

Cooperation through social norm enforcement is maintained by the opprobrium of violators by group members. Such bonds are most likely to exist in smaller close-knit and fairly homogeneous communities,²⁷ where individual members know each other intimately, can observe each other's conduct and can apply social pressure to other members for observed divergences from common and easily identified norms.

In the context of the ICN there are some reasons to be cautious about purely informal socialisation as a sufficient channel for cooperation and compliance with international competition norms. First, the ICN is a large non-selective network encompassing all competition agencies around the world. While it is true that the member authorities have opportunities for frequent and repeated face-to-face interaction through both ICN and other competition forums and bodies, it is also true that the network members are authorities, while the participants in individual meetings are officials.²⁸ The work of Bernstein²⁹

²² (n 1) 197.

²³ Gilson et al (n 17) 1393.

²⁴ (n17) 1393-94.

²⁵ Slaughter specifically refers to the work of Bernstein and Ellickson and the phenomenon of maintaining cooperation and norm-compliance through social bonds in close-knit communities. (n 1) 198.

²⁶ Elster (n 13) 196. Elster also distinguishes between social norms (which an agent observes because their actions are observed by the group) and quasi-moral norms, which we might treat as equivalent to what Gilson, Sabel, and Scott (n 17) call a 'preference for reciprocity', where the agent complies with a norm because they observe other members of the group complying. From the perspective of the enforcement mechanism discussed in this section the key commonality is that both these forms of norm enforcement depend on the actions of each member being observable by other members of the group.

²⁷ Slaughter (n 1) 198-99.

²⁸ This point is also recognised by Verdier (n 18) 165.

and Ellickson (just like the experimental literature on preferences of reciprocity) describes individuals as holders of reciprocity preferences or objects of socialisation, and applying similar analysis to collective bodies and organisations is more problematic. Even if the membership of the authority was assumed to be stable, it is likely that some officials may be more likely to attend ICN meetings compared to others so as to become socialised in the group, and some officials may have preferences for reciprocal behaviour and not others. More fundamentally, the make-up of agencies changes over time and therefore, any purely informal mechanism relying on socialisation or preferences for reciprocity would not be robust.

A further and even more serious problem is presented by the observability of agency actions (and more specifically any deviations from the norms), their attribution and characterisation in the context of a large regulatory network such as the ICN. Similar to the incentive-based mechanism, informal enforcement of social norms relies on the ability of parties to observe the conduct of members, to properly characterise it as a deviation, so that they can either punish or ostracise the misbehaving party. The size of the network (in terms of the number of authorities involved) and the fact that each authority is composed of a relatively large number of individual officials, each of whom may take on a daily basis numerous fact-intensive and context-specific competition decisions makes it exceedingly difficult for others in the network to observe such actions, properly characterise them as either deviant or compliant, and attribute them to the authority. (For example, is conduct that apparently deviates from an established norm a one-off error by an official, or does it constitute evidence of non-compliance by the authority?).

Moreover, the competition authorities that form part of the ICN are not the only relevant national actors when it comes to antitrust policy and decision-making at the national level. The local antitrust rules of any particular jurisdiction are generally determined by legislators, while the general direction of competition policy might be influenced by government ministers or other political officials. In other words, the supranational regulatory network is not entirely self-sufficient within its domain³⁰. In many jurisdictions, the first level decision-maker may be a court, while in others courts would still play a crucial role as part of the processes of judicial review or appeal. Actors such as legislators, ministers, or generalist judges do not, as a matter of course, participate in the deliberation of the ICN.³¹ Therefore, the fact that competition officials might be subject to the social opprobrium of their peers in the ICN for their jurisdiction's violation of the common norms would not be relevant in ensuring a general level of norm compliance.

The nature of the norms and the compliance context also impact the ease of observing and characterising the actions of network members. A social norm such as an injunction that black clothes should be worn at a funeral³² is easy to enforce by groups because attendees at a funeral can easily observe each other and the colour of each other's clothes. While some issues of interpretation and characterisation in such a setting may arise, they are not likely to be significant. Within the Basel club of banking regulators a fairly simple bright-line rule, such as the capital adequacy requirement, was apparently widely adopted and followed even in the absence of any formal enforcement mechanisms:³³

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²⁹ Bernstein's work examines individual traders, and where traders use the corporate form she points out that 'in the cotton industry most firms are privately held'. Bernstein (n 11) 1758. In the same vein she acknowledges that 'the move from small firms to huge concerns with multiple agents buying and selling for their accounts may also undermine the maintenance of cooperation'. (n 11) 1786 n 233.

³⁰ Micklitz (n 7) 56-57.

³¹ While Slaughter points to the fact that legislators and judges are often themselves involved in transnational networks, such groups would not be relevant to the enforcement of norms developed within apparently self-sufficient networks of regulators. The links across such networks are currently simply too attenuated and not likely to become more robust.

³² Elster (n 13) 195.

³³ Zaring observes that the Basel Accord 'has enjoyed widespread compliance despite being putatively nonbinding'. David Zaring, 'Informal Procedure, Hard and Soft, in International Administration' (2005) 5 *Chicago Journal of International*

Compliance with that type of a rule might be relatively easier to observe,³⁴ even if we abstract from recent debates about precisely what counts as holdings of adequate liquid capital.

This is not the case with many of the antitrust norms generated through the ICN. Even if the participant authorities were to agree on a common approach for analysing the competitive effect of mergers or exclusionary conduct by dominant firms, non-compliance with the common norm would be difficult to observe given both the possibility for divergent interpretations as well as the very fact-intensive nature of antitrust decision-making. In other words, understanding whether an authority does indeed comply with commonly adopted norms requires a fairly intense engagement and appreciation of the market dynamics underlying each decision, which would not be an easy task even for a body, such as a court, exclusively dedicated to the question of compliance.

Moreover, if the current antitrust rules of various jurisdictions or recommended practices elaborated within the ICN are a guide, the typical network norms or best practices are not simple bright-line rules. Rather they are more likely to be expressed as broader standards leaving substantial residual discretion to authorities in applying them to specific local circumstances. This means that even if the numerous actions and decisions of individual officials are observable within the network, the signal sent by each decision is likely to be quite noisy so that it may often not be easy to characterise it as compliant or not through mere observation from a distance and without a deeper engagement in the enforcement effort and its results.

Problems of characterisation of conduct as compliant or otherwise can arise even with respect to fairly simple rules, if there exist possible attenuating circumstances that justify an apparent deviation. To return to the example of the simple norm, it may be justified by the social group for a member to wear navy clothes at a funeral, if they do not own black clothes, if they cannot afford to buy new ones just for the funeral, or if due to some other exigency it was impossible to procure black clothes in time. Similarly, it may also be justified by the ICN membership for an authority not to take action against a specific merger if it has no power to enforce its decision against the firms involved or to adopt certain emergency measures in times of economic or other crisis.

As Gilson, Sabel, and Scott observe, in a ‘noisy’ environment, where there are numerous potentially confounding (and excusing) factors making it difficult to characterise conduct as cooperative or deviant, the dominant strategy for individual parties is ‘more forgiving’.³⁵ In other words, they would tend not to punish every time there is a suspicion of non-compliance. But this presents a problem where the participants in the network are numerous and are not pre-screened for their predisposition to reciprocate, and where any common norms are neither simple nor pre-existing, but are being developed over time within the network. These problems of observability and characterisation of conduct will undermine any mechanism of informal enforcement that relies on group observation and sanctioning of conduct, either through the withdrawal of continued cooperation or through social opprobrium, in the absence of some mechanisms of formal reporting and comparison of implementation efforts and results that would enable network members to understand what precisely the others are doing.

In Elster’s classification of the non-legal modalities of maintaining cooperation, there is only one that does not depend on the ability to observe and characterise the actions of others in the group, namely the enforcement of moral norms. An agent observes a moral norm where they follow the norm irrespective of their incentives and irrespective of whether they are observed or observe anyone else in

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Law 547, 595. By contrast the more flexible rules of Basel II might make defections harder to detect. Verdier (n 18) 137, 142.

³⁴ Bernstein, for instance, notes that industry trade relies on ‘primarily clear bright-line rules’. It is precisely the ‘clarity of the rules, together with the efforts associations make to ensure transactors understand them’ that ‘reduces the likelihood that misunderstandings will arise’. (n 11) 1732-33, 1742.

³⁵ Gilson et al (n 17) 1394-95.

the group complying with the norm. In other words, they have developed a preference for following the norm.

There are various reasons for scepticism that such an enforcement mechanism would be relevant in the ICN context. Perhaps the most important one is the fact that the ICN was not formed with the view of enforcing a pre-existing set of norms. Instead, the norms were to be developed through discussion and interaction within the ICN. Moreover, many of the authorities lacked the analytic capacity to enforce competition norms and therefore part of the objective of the ICN is to build up enforcement capacity within its membership.

The enforcement of moral norms, according to Elster's taxonomy, is true self-enforcement because it relies in self-policing. But it requires that each individual agent knows the norm, knows how to apply the norm in a particular situation and is capable of characterising her own behaviour as compliant or non-compliant with the norm. Thus, to take Elster's examples of relatively simple injunctions, such as not littering in a park or wearing black clothes to a funeral, whatever the origin of the norms, one can envisage that after a period of following the injunction and observing others following it, the norm may become intrinsic to the agent. If there exists some room for self-doubt in any of these steps, the individual member may need some process through which to learn precisely what the norm requires, how it might be applied in specific circumstances and what might constitute compliance or deviation; this is if the norm is in fact constitutive of their identity rather than merely a post hoc rationalising incantation. That process would require observation of and comparison with the conduct of others in applying the norms in similar circumstances.³⁶ Where, such as in the ICN, the group does not begin with a set of norms, such processes would also be necessary for the norms to crystallise in the first place.

Again it bears reiterating at this point that if there is a clear distinction between members of an agency who participate in international ICN deliberations and those who do not, yet who have daily decision-making responsibilities, this process of internalisation of norms is made all the more difficult. Further, if the network is to rely on officials becoming socialised into the 'competition community' so that they develop a preference for following common norms, and if the common norms change from time to time for any reason, some mechanism would need to exist for dropping the old and learning the new practice.

Enforcement Subsets?

Slaughter recognises that informal processes of maintaining cooperation are likely to be the strongest in organisations with 'small and selective' membership, such as the Basel Committee, given that it is made up of representatives of the central banks of a small number of industrialised countries.³⁷ Along those lines, the ICN does envisage that the enforcement of the established norms could take place in smaller groups or subsets of nations.³⁸ However, the selectiveness and stability in the membership of such bodies means that it will be more difficult to disrupt a consensus which is sub-optimal or to adjust the consensus to a changing underlying environment. If there is no follow-up on actual implementation and a way to identify new problems and threats, this limits the learning capacity of such groups. Thus, while a club-like environment makes it more likely to be flexible or permissive towards alternative approaches followed by individual members, the absence of follow-up on

³⁶ This is not a trivial problem. Recognising whether particular agency conduct follows the common norms or not may well require engagement with peers from other authorities. In other words, in a noisy environment, an agency official may not be sure what constitutes compliant conduct and may require some tool to make such a determination.

³⁷ Slaughter (n 1) 199-200.

³⁸ ICN Establishment Memorandum (n 3) 'Where ICN reaches consensus on recommendations ... it will be left to the individual antitrust agencies to decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements').

implementation may limit the ability of the group to learn from any residual diversity among the membership.³⁹

The Generation of Norms in a Regulatory Network

The prior section proceeded on the premise that the ICN has normative ambitions. In other words, it generates normative output (such as recommended practices) that, it is hoped, will affect the actions of the member authorities even in the absence of formal enforcement tools.⁴⁰ Therefore, the first question we asked is whether the informal bonds that can support cooperation in groups are likely to emerge to give bite to the normative output of the ICN and this appears to be unlikely within the ICN's current architecture. Given that the norms are neither simple nor pre-existing, and given that the ICN does not have mechanisms through which to make the conduct of member agencies observable to each other in a systematic way, the ICN architecture itself is not likely to provide a substantial constraint on the action of member agencies, let alone their respective States.

This might, in turn, lead us to the question of why choose an informal network forum in this context in the first place?

In answering this question, it is worth recalling that problems associated with observing and characterising conduct (both by the parties and by an adjudicator) also present the principal difficulties for legal enforcement in many different contexts⁴¹. In fact, we may argue that one of the principal reasons for the repeated failures in the negotiation of a binding antitrust instrument at the international level is the fact that the decision-making of competition regulators and courts is extremely fact-intensive and context-dependent, with most national regimes – at some point in the decision-making process – allowing for broader consideration and balancing of relevant factors.

The competitive significance of a restraint on conduct or merger would depend not only on the current structure and players of the domestic market, but on a myriad of other considerations, including the openness of the domestic economy to foreign entry, the existence of formal government restrictions on market entry, as well as informal political/economic interests that effectively foreclose entry in some domestic markets. It is precisely in the context of such thick consideration of facts and local conditions that verifying compliance with norms presents a challenge for an independent decision-making tribunal, such as a court, even where there exists some corpus of commonly-agreed upon norms.

The reality of the very fact-based nature of antitrust decision-making would therefore be a significant impediment to both the creation and the verification of compliance with a formal instrument of binding norms. Moreover, as is often the case with the informal transnational networks, at the time of the creation of the ICN there were few commonly-agreed to antitrust norms or principles at the global level. This fact is not surprising given the failure of the push by the EU to include even minimal antitrust approximation within the Doha Round of WTO negotiations. The EU's proposal envisaged only one harmonised substantive norm, namely a rule against horizontal cartels, which was thought to command a fairly broad consensus. Even this minimal harmonisation proposal was seen as

³⁹ For instance, Zaring notes that the Basle standards were acclaimed for their real impact and for the strengthening in risk management which was said to be responsible for the absence of significant difficulties in US or European banking systems. (n 33) 560. Even accepting that as true, the Basel Committee standards did not avert the more recent major crisis in the banking sector. As Christensen would argue, expertise with the current technology makes the incumbent blind to disruptive threats, particularly if the incumbent closes the door to information about such threats. We can pinpoint these characteristics of the club environment in Verdier's retelling of the Basel case study, including an over-confidence that the 'club rules' are optimal, permissiveness to deviations by club members, and yet a resistance to learn from divergent approaches (such as those of Germany and Japan). Verdier (n 18) 135-140.

⁴⁰ In other words, while not formal law, the ICN output does seek to constrain the freedom of members to act on the basis of purely unilateral considerations.

⁴¹ Eg Robert Scott and George Triantis, 'Anticipating Litigation in Contract Design' (2006) 115 Yale Law Journal 814.

unacceptable for representatives of developing nations, who feared being boxed into an enforcement regime that did not reflect their local developmental priorities.⁴² For instance, developing nations' concerns would have focused on the fact that certain policy tools such as industrial or production clusters (seen to have been the key in the development process of some industrialised nations) or export associations (to provide a counterweight to the market power of a foreign buyer) would be foreclosed by such a rule. Moreover, an international rule against cartels would force domestic agencies to prioritise such enforcement even if they perceive a greater threat from the monopoly or monopsony power of large multinationals, against which they would have little or no recourse. Additionally, jurisdictions which are newer to the antitrust game would also be reluctant to assume binding obligations because of the lack of resources and capacity of their implementation regimes. In other words, such jurisdictions might be found to have failed in their international obligations where enforcement agencies simply did not have adequate resources to devote to certain problems, or where due to lack of resources combined with inexperience they reached decisions later found to be inconsistent with international norms. As a result, at its inception the ICN was starting largely from a blank slate at least in terms of agreed upon substantive or procedural norms.⁴³

The question of the informalism of networks tends usually to be viewed through the prism of enforcement as the usual task of international bodies under traditional conceptions of international law. In the traditional international law framework, States' representatives first negotiate the common legal rules or norms, and then seek to empower a particular organisation or dispute-resolution body with the task of enforcement. By contrast, TRNs and other informal law-making fora are commonly formed when there does not even exist an agreed upon set of norms. Therefore, in evaluating the efficacy and accountability of these newer instruments of international cooperation it is not sufficient to focus on a single dimension, such as the capacity to enforce norms. Instead, we must assess the role and adequacy of informal mechanisms for the emergence of common norms and the understanding of such norms among the membership, but also for building up the members' capacity to implement them. In TRNs the processes of norm-creation, mutual learning, capacity building, and implementation tend to take place simultaneously. How those processes are structured, or formalised, may have important consequences on the efficacy and legitimacy of TRNs as tools of international cooperation quite apart from the question of enforcement.

Formalisation and Learning

In light of the foregoing, one response to the claim made at the outset that the tools of self-enforcement are unlikely to develop to maintain cooperative behaviour within the ICN might be that the ICN does not aim to be an enforcement network. Instead, given the limited goals established from the very outset, the ICN could be classified as an 'information network', to use Slaughter's⁴⁴ taxonomy, which is focused on exchange of information and learning. For instance, the *Establishment Memorandum* refers to the ICN missions of 'encourag[ing] the dissemination of antitrust experience,' building on existing contacts among agencies and 'provid[ing] the opportunity for its members to maintain regular contacts' through meetings and conferences. Similarly, much of the enthusiasm that

⁴² Mariana Bode and Oliver Budzinski, 'Competing Ways Towards International Antitrust: The WTO versus the ICN' (2005) Marburg Papers on Economics No. 03-2005 <<http://www.uni-marburg.de/fb02/makro/forschung/gelbereihe/artikel/2005-03-Bode-Budzinski.pdf>> accessed 13 November 2011; Ajit Singh, 'Multilateral Competition Policy and Economic Development A Developing Country Perspective on the European Community Proposals' (2-4 July 2003) Fifth Session of the Intergovernmental Group of Experts on Competition Law and Policy in Geneva <<http://www.networkideas.org/feathm/aug2003/MCP.pdf>> accessed 13 November 2011.

⁴³ The ICN was formed on the basis of a US proposal and it bears noting that the US was itself not too enthusiastic about a hard international competition instrument due to fears that it would diverge substantially from US rules. Eleanor M. Fox, 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) 43 *International Lawyer* 151, 157.

⁴⁴ Slaughter (n 1) 52.

has been expressed about the ICN has focused precisely on its function as a vehicle to ‘facilitate the sharing of information and experience, facilitate cooperation, and work towards consensus rules, principles, methodologies, and procedures’.⁴⁵

Yet the mere classification as an information network does not insulate it from evaluation of efficacy or accountability. Instead, this simply raises the further question of how we can make efficacy and accountability assessments where the emphasis of a TRN is on learning. It seems that the question about the quality of learning that takes place in such a network cannot be answered without focusing on what member agencies do in their domestic implementation and the extent to which this reflects the norms and practices learned from their network peers. Given that the processes of norm creation, learning, and implementation are not staggered, but take place simultaneously in a dynamic environment, questions of learning and implementation are inextricably linked.

From the very outset then we face the problem that, while discussions among officials may be useful to share experiences and test more abstract ideas, it is exceedingly difficult to assess the efficacy of such a forum, the quality of the learning that takes place and ultimately the usefulness of the network without some mechanisms that track the impact on relevant domestic or international outcomes, which should be built into the architecture of the network. Discussions after all do not resolve specific cases and disciplined learning is not merely anecdotal, but it requires some formulation of knowledge either from first principles or through the formalisation of practice. It is not surprising then that even for a network that did not aim to develop an antitrust code, the ICN from its very first meeting onwards proceeded towards the development of recommended practices (in the format of rules) for member authorities to follow in their decision-making.

Learning across agencies cannot take place absent some formalisation of knowledge where there is a diversity of implementation strategies available and where there is some uncertainty as to whether one or other would lead to successful implementation. We might rightly be sceptical about the kind of transfer that takes place where inter-agency ‘contacts’⁴⁶ lead to nothing other than unstructured ‘two-by-two’ learning.⁴⁷ For instance, the mere fact that the EU provides funding by way of technical assistance for the establishment of a competition regime does not necessarily mean that the EU legal provisions or enforcement model provide a good template for the recipient nation. In fact, the thoughtful adoption of an example from another jurisdiction will almost certainly involve an adaptation to the local circumstances,⁴⁸ which adaptation itself might be useful for some other jurisdiction.

Interviews with officials from different jurisdictions revealed a number of problems associated with unstructured (or two-by-two) agency contacts in the process of learning and exchange. For example, a Barbados official described an informal consultation relationship developed with the US Federal Trade Commission (FTC), noting that he and his colleagues, when dealing with a specific case, would ask whether FTC officials ‘have come across this type of activity before in this sort of industry’ and ‘what their experiences have shown them’ in such cases.⁴⁹ But for such a relationship to work, the requesting authority needs to be able to forward the questions to a specific person at the other authority, who has both the time and the relevant knowledge to share with the requesting authority, which may often not be the case.

⁴⁵ Fox (n 43) 160.

⁴⁶ ICN Establishment Memorandum (n 3).

⁴⁷ The term as used in this context is due to Andrew Moravcsik.

⁴⁸ Michal Gal, ‘The “Cut and Paste” of Article 82 of the EU Treaty in Israel’ (2007) 9 *European Journal of Law Reform* 467, 482.

⁴⁹ Interview with Official of the Fair Trading Commission of Barbados (Zürich 4 June 2009).

Authorities sometimes try to deal with this problem by formalising their interactions rather than relying on ad hoc contacts and requests. Thus, the Barbados official described that in their interactions with the FTC, a ‘resource person’ was identified as a ‘sounding board in terms of ideas and discussions when [Barbados officials] have issues that [they] find unique and unusual’.⁵⁰ However, given similar concerns about time and commitment, the Barbados official noted that they had moved away from ‘ad hoc calls’ towards ‘scheduled calls on a quarterly basis’, which are preceded by the Barbados officials sending in advance selected reading materials about current cases for consideration by the designated FTC contacts.⁵¹

Note however that giving structure to the two-by-two relationship in this way does not guarantee that the other authority will have relevant knowledge to share. The Barbados official, for instance, emphasised that in their discussions with the FTC both sides recognised that the setting in which the Barbados authority operates, including the structure and size of the economy, is drastically different from that of the US. Thus, while the Barbados enforcers sought to understand the FTC’s experiences, they would often recognise that their own local ‘circumstances were different’,⁵² which in this bilateral dialogue is essentially the end of the conversation and the learning process.

The borrowing of an implementation practice, if it occurs in such a bilateral dialogue, can either be entirely appropriate, or it can lead to the borrowing of a practice that is not effective at all, or one that is not likely to be effective in the recipient’s domestic context, or one that reflects policy preferences and needs in the first jurisdiction, but not in the recipient one. Without exposing this exchange to scrutiny from the point of view of implementation outcomes in both the advanced and the recipient jurisdiction, it is difficult to assess either its efficacy or accountability.

By multiplying the sources of examples, the network structure improves the ability of participants to learn from appropriate or relevant sources, but whether such potential is realised depends on the architecture of the network and how the interactions between authorities are structured, in other words, on how knowledge is formalised and transferred. Taking the knowledge transfer out of two-by-two conversations does also improve the accountability and transparency of transnational agency interactions, often a point of criticism of TRNs, but not at the expense of the efficacy of learning.

The promulgation of recommended enforcement rules and practices in the ICN setting is one example of formalisation of knowledge.⁵³ One advantage of such a tool is that selection of best practices as a regulatory method can work ‘through horizontal modeling rather than hierarchical direction’, allowing for a degree of ‘localism or subsidiarity’ by contrast to the standard harmonisation approach.⁵⁴ In addition, the formalisation of best practice selection suggests a more disciplined approach to the dissemination of information to member authorities, taking the ICN beyond a mere talking forum in which antitrust officials are to learn either through conversation, osmosis, or acculturation to widely accepted, though untested, verities such as a belief in the efficiency of business conduct or a mistrust of bigness as a badge of market dominance. Making tacit knowledge explicit makes it both easier for newcomers to learn it, but also subject to scrutiny from outside the network.

⁵⁰ (n 49).

⁵¹ (n 49).

⁵² (n 49).

⁵³ In a description of the ICN’s methods Monti explains that the typical approach is ‘to identify issues for coordination, for which [the ICN] establishes a working group’, which group then ‘carries out various surveys and consultations’ and then ‘releases documents outlining “recommended practices” in the given field, as well as “workbooks” or “handbooks” explaining how certain kinds of antitrust analysis ought to be carried out’. Giorgio Monti, ‘Unilateral Conduct: The Search for Global Standards’ in Ariel Ezrachi (ed), *International Research Handbook on Competition Law* (Edward Elgar, forthcoming 2012).

⁵⁴ David Zaring, ‘Best Practices’ (2006) 81 New York University Law Review 294, 297.

The compilations of recommended practices do look like a set of antitrust model rules, despite the fact that the ICN explicitly disclaims a mandate to develop an antitrust code. Such recommended practices are formalised through deliberation and, at least notionally, require consensus from the membership even if compliance with them is not in any way binding.

While consensus is required for the adoption of suggested practices in the ICN, it does not have the quality of hard consensus of the kind required (at least ideally) in treaty negotiations. Recognising the non-binding nature of the ICN best practices, representatives of national agencies will not block consensus even where they hold the view that the adopted recommendation is not appropriate to specific circumstances and market conditions in their own jurisdiction and that they are not likely to follow it in the future.⁵⁵ To the extent that these authorities have correctly assessed their domestic circumstances and needs, precisely the non-implementation of the ICN recommendation is consistent with the goals of efficacy and accountability.

Such divergence in national practice can be a potential source of improvement in the norms of the TRN as well. Hard harmonisation of simple rules cannot be an object in itself where there is a wide divergence in implementation contexts and local policy objectives and the weighting of those objectives. It may well be that in particular implementation circumstances it makes sense to follow a different enforcement practice and this could be revealed in follow-up of the use of the recommended versus the diverging rule. Thus, for example the rationales offered by authorities for their divergence from ICN recommendations are testable and, moreover, they are potentially applicable in other countries. However, the interviewed officials regarded the adoption of a best practice as the closing of the ICN conversation, rather than the opening of further deliberation. Namely, they referred to arguments they made for the adoption of rules different from the ones that had been proposed for adoption by ICN working groups. While noting that their arguments did not prevail and they ultimately lost the battle in the ICN, both indicated that their own jurisdictions/agencies nonetheless continued to follow the earlier approach in domestic cases.⁵⁶ The resulting closure of deliberation, perhaps due to the focus on achieving consensus and going forward, might be a particularly undesirable aspect of the ‘let go if you lose the battle’ social norm in network deliberations,⁵⁷ which should be corrected for in the formal network infrastructure.⁵⁸

The foregoing example illustrates a paradox. Namely, the absence of notionally hard and enforceable legal rules does create incentives for participants in TRNs to engage in freer information exchange with their peers. Otherwise, it is likely that both consensus on norms would be very difficult to reach and participants would not be so free to elaborate on the conditions that lead them to diverge from proposed norms. But even if, as the current chair of its Steering Committee has claimed, one aim of the ICN is to benefit from ‘informed divergence’ among network members,⁵⁹ the network would need to formalise mechanisms that enable observability and characterisation of conduct, even if just for the

⁵⁵ We might thus speak of the emergence of social norms about the manner in which deliberations and consensus formation take place within the ICN. While this is by no means conclusive evidence, it seems that both these agencies argued in favour of their position on two different issues, though they were willing to let go (in the sense of not blocking consensus) once their views did not prevail. Note, however, that the establishment of a norm against blocking consensus, absent any follow-up on the reasons for possible divergence, can lead to the emergence of the kind of surface consensus where neither the norms are enforced, nor learning takes place. Goffman describes such a phenomenon as the ‘maintenance of this surface of agreement, this veneer of consensus ... facilitated by each participant’s concealing his own wants behind statements which assert values to which everyone present feels obliged to give lip service’. Erving Goffman, *The Presentation of Self In Everyday Life* (Anchor Books, New York 1959) 9.

⁵⁶ South Africa Interview (n 19); Israel Interview (n 19).

⁵⁷ Supra (n 52).

⁵⁸ Yane Svetiev, ‘Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?’ in Charles Sabel and Jonathan Zeitlin (eds) *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP, Oxford 2010) 114.

⁵⁹ John Fingleton, ‘Closing speech to International Competition Network (ICN) conference’, Zürich 5 June 2009.

purposes of learning. Namely, the network requires mechanisms through which the membership could observe the conduct of agencies and characterise it vis-à-vis emergent common norms, exploring the reasons for any divergence and the outcomes from the implementation of the divergent practice in their local contexts. Moreover, observability and characterisation of conduct also aid in the accountability of ICN members both towards their international peers and towards their domestic constituencies; this is because they can demonstrate both what they learn from and what they contribute to the transnational network.

This discussion has, apparently, brought us to a full circle. If we were to look at the networks as vehicles for the enforcement of norms, the key limitation is the absence of mechanisms for making conduct observable and characterising the extent to which it complies with common norms. Networks as fora for learning from peers require the formalisation of mechanisms that serve precisely those very same functions.

Agenda Setting and Decentralised Learning

Before concluding, it is worth pointing out another aspect of the norm-generation and learning process in the ICN. As already pointed out, within the ICN there has been an effort towards collective formalisation of knowledge and learning that goes beyond unstructured discussion or two-by-two learning. However, to understand the limitations to the potential for decentralised learning, we also have to focus on the architecture of the initiation and conduct of such exercises.

In particular, in an environment where the network does not have a formal secretariat and governing body, the day-to-day organisation tasks often go to the authorities of the established jurisdictions from industrialised countries.⁶⁰ This has certainly been the case throughout the brief history of the ICN and in principle there is nothing sinister about that fact. Officials from these larger and better-funded authorities may well view this as a form of public service to the international community and an alternative to more standard forms of development assistance.

However, reliance on advanced authorities in this way also has substantive consequences in terms of the kind of learning that takes place within the network. For instance, topic areas for discussion or for the elaboration of recommended practices may reflect areas in which there is a consensus between established antitrust jurisdictions (such as procedures of merger review or rules on cartels). This in turn may discourage precisely the kind of experimentation that would reveal improvements on the current consensus or that would reveal alternative rules and methodologies appropriate for jurisdictions with differential market and developmental conditions. This is particularly so when we consider that antitrust is a policy area that is not entirely contained and self-sufficient, in the sense that it easily impinges upon other policy areas with developmental, industrial, redistributive, and even environmental goals.

In addition, even where agenda-setters aim to choose topics on which there is no current consensus as between established jurisdictions, they may choose issues that have low enforcement salience in many of the newer antitrust jurisdictions. As one example, consider the 2009 annual ICN meeting in which one principal topic of discussion for the plenary sessions was the antitrust treatment of bundled and loyalty discounts. This may be regarded as an issue on the cutting edge of antitrust law and economics, and on which the principal jurisdictions (the US and the EU) have diverged in their approach. Arguably, however, in many of the emerging antitrust jurisdictions this is an issue of quite low enforcement salience, which means that both the relevance of the learning exercise and their ability to contribute to such an exercise or learn from it is limited.

⁶⁰ Fox (n 43) 167: ‘Less well-resourced authorities have constraints against aspiring to be chair of the steering group and even serving as a member of the steering group. This means that authorities from resource-strained nations have less opportunity to participate in setting the agenda and to write first drafts of recommendations’.

One representative of an NGO that has been operating to promote competition and consumer protection regulation in the developing world referred to these aspects of the agenda-setting process and the framing of discussions within the ICN as an ‘abuse of dominance’ by the agencies of the western industrialised nations.⁶¹ It is certainly the case that this type of agenda-setting promotes a more passive participation for representatives of newer jurisdictions in the deliberations of the network. Given that authorities of the newer jurisdictions are not likely any time soon to be able to replicate the resources, enforcement staff, and antitrust professionals (lawyers and economists) of the western agencies, the principal objective should be not just to educate these officials on the analytic intricacies of advanced and contested antitrust problems. The objective instead should be to uncover and disseminate knowledge about ‘disruptive’⁶² enforcement strategies – low cost enforcement targets that might bring about relatively substantial benefits to local consumers or businesses in a way that makes perceptible the benefits of competition policy and in turn strengthens the authorities’ hand to pursue other, often politically sensitive, cases.

Conclusion

Attempts at achieving a formal international instrument in competition law have failed on numerous occasions for a number of different reasons. One is the fact that competition policy tends to overlap with a number of different policy areas and potentially affects numerous policy goals, including sensitive areas such as essential services, industry policy and developmental policies more broadly. Another is that competition policy is not an area easily susceptible to the formulation of clear rules, particularly when we take into account heterogeneity of policy objectives and market and industrial contexts across and within different nations. In addition, application of any agreed-to competition rules is always very fact intensive. As a result, observing decision-making conduct of national bodies and verifying compliance with supranational norms is extremely challenging even for a specialised dispute resolution body.

Given these background factors, perhaps it is unsurprising that when, in face of multiplying antitrust regimes around the world, some international cooperation became a necessity, it was channelled through a network of competition enforcers. The ICN aimed to be highly informal and, at least at the outset, not particularly ambitious in its goals. The aim was to begin an engagement between the different antitrust jurisdictions of the world, which might avoid some of the excesses of the multiplication of enforcement regimes (such as in cases of merger notification) and provide a forum for capacity-building and learning, particularly for officials of emergent jurisdictions.

Yet in many regulatory networks, whether in the EU or at the international level, the formality or informality of the network should not be viewed as an on/off switch. To the contrary, we may speak of different dimensions of formality; a point that is sometimes overlooked in the private contract literature as well. Thus, we can speak of the formality of the instrument setting up the network (is it written, does it aim to be as complete as possible); the formality of deliberations (are there formal rules of engagement, discussion, voting); the formality of the normative output (does it produce rules or mere guidance as to how officials of member authorities should proceed in individual national cases), and the existence and formality of the enforcement mechanisms. As the contract literature recognises, parties may decide to formalise certain aspects of their interactions for specific purposes, such as the building up their relationship, trust, or generating learning, completely independent of enforcing any specific commitments as to final outcomes.⁶³

⁶¹ Interview with Official of the Consumer Unity and Trust Society (Zürich 3 June 2009).

⁶² Clayton Christensen, *The Innovator's Dilemma* (Harper Business Essentials, New York 2003).

⁶³ Eg Gilson et al (n 17).

The enthusiasm about transnational networks, including in EU regulation recently, does stem in part from their less formal, self-sufficient and therefore more flexible character. This means that such networks were much easier to set up in response to concrete problems (such as the increased compliance costs on business given the growth of merger control regimes around the world) without slow treaty negotiations in which relatively less knowledgeable diplomats had to negotiate and arrive at a more or less complete instrument. Moreover, the less formal character also meant that a transnational network could quickly change its agenda and focus in cases where the problems faced by regulators change. This is an important advantage if we believe that regulators are facing a more dynamic environment in which it is difficult *ex ante* to both predict and provide adequate rules for the types of problems that will arise in the future.

Once we move to the issue of evaluating the efficacy and accountability of these networks, however, the different effects of informality and the purposes and effects of formalisation come into sharper relief. Thus, in Hadfield's description of private regimes for internet governance, we notice that formalised features become more prominent⁶⁴ and assume a greater significance compared to Bernstein's cotton traders. This is no surprise given that the body of participants in internet governance is global and entry and exit is costless, while pre-existing social bonds and mutual observability largely non-existent. Yet, ICN cognoscenti tend to describe this network as a 'community of interest',⁶⁵ presumably as a way of highlighting its specialist make-up and its reliance on informal bonds to sustain cooperation.

We might envisage two very different metaphors for the informal network of regulators as a 'community of interest' for purposes of developing a framework for evaluating efficacy and accountability.

One metaphor might be the 'choral society' or 'bird-watching club' referred to in the work of Putnam and his collaborators on Italy. The metaphor serves the limited purpose of highlighting the point that, on this view, we would not be particularly focused or interested in the specific activities and outcomes of the regulatory network.⁶⁶ Instead, taking part in the group would in itself be a good thing for national officials in that it would generate trust, 'skills of cooperation', 'shared responsibility for collective endeavours', and 'appreciation for the joys of successful collaboration'.⁶⁷ On this view, we would not be particularly concerned about the evaluation of efficacy of the network, because mere participation in events achieves its main purpose. But, irrespective of whether participation in a choral society does indeed generate trust among its members and a shared responsibility for the collective, we might be sceptical that it would take place in a large and extended network such as the ICN. The membership of the ICN is too large and the officials who take part in activities and conferences may be transient while their interactions are occasional. Nor is it the case that most of the ICN activities involve close hands-on collaboration on joint projects with observable successful outcomes.

Moreover, the ICN as a community of interest is focused on the design and implementation of competition policy. To the extent that it provides a setting for the unstructured learning through private conversations or exchanges of draft opinions as between national officials, there would be both efficacy and accountability concerns about such learning processes. First, informal two-by-two learning is neither stable nor robust. Secondly, in such two-by-two relationships it is not clear what

⁶⁴ Gillian Hadfield, 'Privatizing Commercial Law: Lessons from ICANN' (2002) 6 *Journal of Small and Emerging Business Law* 257.

⁶⁵ Fingleton (n 59).

⁶⁶ Bernstein, for instance, points out that as background social and community forces become weaker in trader communities, industry associations have resorted to sponsor activities that would recreate 'deeply interconnected business and personal relationships' such as a 'civic cotton carnival', golf and domino tournaments, a 'Cotton Wives Club', etc. (n 11) 1750-51.

⁶⁷ Robert Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press, Princeton 1993) 86-91.

kinds of transfers are taking place because the exchanges do not tend to be transparent or reviewable. This is a clear case where improving transparency through the architecture of the international forum aids both accountability (of domestic policy officers to domestic publics) and efficacy of implementation (by subjecting the transfer that takes place to peer review).

One other possible metaphor for a purely informal group would be the club or even the cartel.⁶⁸ Having a restricted number of relatively homogeneous members with very similar preferences and on-going contact with each other, the cartel seeks to ensure compliance with a very simple norm – such as a common price that maximises joint profits – without legal mechanisms available to ensure such compliance.

Again, our discussion suggested substantial caution about the view that a TRN, such as the ICN, can be a tool for self-enforcement of global norms. First, most recommended practices elaborated as part of the ICN are not simple one-dimensional injunctions. The mechanisms for non-legal enforcement of cooperation require modalities to make members' conduct observable and to characterise it as compliant or non-compliant with group norms. This is particularly difficult in diffuse decision-making settings, involving very fact-intensive determinations, where the rules are not of the bright-line variety, and where the network is not entirely self-sufficient in that there are many relevant decision-makers, such as courts or politicians, who operate outside of the network.

The description of the ICN offered here does not seem to align with either of the above metaphors. One advantage of the ICN as a broad-based forum is the fact that officials of member agencies have a wealth of experiences and examples available to them to learn from. Moreover, the non-binding nature of ICN recommendations would not ordinarily foreclose experimentation and improvement. This also presents a limitation, however, since some mechanism is needed to collect information about these experiences and to provide a basis for jurisdictions to make a choice in a systematic way. Therefore, even in a forum for learning and exchange, certain mechanisms will need to be formalised. From that perspective it is encouraging that the ICN formalises its normative output through some information-gathering, the development of reports and the elaboration of recommended practices. Knowledge transfer requires practical knowledge to be made explicit in some way and this in turn makes such transfers subject to scrutiny from external stakeholders. While this is preferable as compared to unstructured two-by-two or reputation-based learning, this contribution also suggests a word of caution about what assumptions are being made both about the current state of the art and about harmonisation as a goal in such networks. If we agree, (1) with Christensen,⁶⁹ that experts and leaders in current best practices may be blind to solutions which could adequately serve current 'non-consumers', and (2) that some tailoring is required of competition enforcement priorities and techniques to different national contexts, there may be reasons for concern about the ICN's focus on *ex ante* guidance documents. Learning from peers requires mechanisms to make their implementation of common norms observable and its consequences subject to review. The kind of tracking of implementation currently done by the ICN, such as counting the number of jurisdictions that have followed ICN recommended practices in their domestic laws, is not particularly helpful in stimulating meaningful learning. What is needed instead is the establishment of mechanisms that link model rules, implementation strategies, and outcomes in the different jurisdictions as a basis for further ICN deliberations.⁷⁰ Along this dimension, many of the global regulatory networks tend to fall short.

In the EU context, answering the question of whether EU networks are one channel for the creation of a self-sufficient EU private legal order requires precisely the examination of the feedback loops between EU networks and domestic agencies and their implementation and enforcement activities. But care needs to be taken in interpreting the results, given that the same channels of monitoring,

⁶⁸ Micklitz (n 7) 58.

⁶⁹ Christensen (n 59) 178-79, 196.

⁷⁰ Svetiev (n 55).

review and characterization can serve more than one purpose or function. Identifying which is the relevant function they serve may well require tracing such feedback loops over time.

II. SELF-SUFFICIENCY THROUGH NARROWING THE POLICY MANDATE^Ω

Introduction

Competition policy has been called the European Community's "first supra-national policy"¹. To some extent, this success is increasingly reflected also at the international level. Thus, international competition lawyers often refer (with some pride) to the exponential growth of the number of jurisdictions in the world that have adopted antitrust enforcement regimes since the early 1990s. Namely, over 100 national jurisdictions now have some competition law mechanism and in addition quite a few regional integration regimes contain competition provisions². Since industrialized countries have been covered by the more established and long-standing antitrust regimes in the US and the EU, much of that growth is due to the adoption of competition laws by transition and developing economies. Some of those jurisdictions have adopted or strengthened their competition enforcement regimes of their own initiative³, however more often such a regime is implemented at the instigation or encouragement of international donors and development bodies, such as the World Bank, the IMF⁴ as well as the EU⁵.

While as a result many nations have now adopted such laws, little is known about the effects or outcomes of this trend in the developing world⁶. On the question of effectiveness, interest often tends to focus on the question of whether laws are implemented, whether there exist enforcement institutions, whether those institutions are active or whether they are regarded as successful by their peers in other countries. Yet having a highly active competition authority, which commences many investigations, even completes many of them, and collects high levels of fines is only one set of indicators of success of a nascent competition regime. The more fundamental question relates to the ultimate outcomes of this proliferation of competition laws in the developing world and the relationship to the overall objectives of public policy. Is this merely another market-opening mechanism against poorer nations that serves the trading interests of industrialised nations and their multinational companies? Alternatively, given the overriding importance of developmental objectives in these nations, does competition law contribute towards, or at least not detract from the achievement of developmental goals, such as the promotion of sustainable growth, the reduction of poverty and malnourishment, and the overall increase in human development? Moreover, are any beneficial

^Ω A revised version published as "Antitrust Law and Development Policy: Subordination, Self-Sufficiency or Integration?", in *European Yearbook of International Economic Law* (2013).

¹ McGowan/Wilks 'The First Supranational Policy in the European Union', *European Journal of Political Research*, 28 (1995), p. 141.

² Fox, In search of a Competition Law Fit for Developing Countries, NYU Law and Economics Research Paper Series, Working Paper 11-04, 2011, p. 7, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1761619 (last accessed 12 March 2012).

³ The former socialist nations of Eastern Europe, for example, established competition enforcement regimes as part of their efforts at transition to a market economy.

⁴ In an interview an Egyptian Competition Authority official explained that the IMF had pressed for the adoption of a competition law, but that Egypt could delay its adoption since it "wasn't one of the [top] priorities [for the IMF]". Interview with Egyptian Competition Authority Official (Zürich 2 June, 2009).

⁵ Fingleton/Fox/Neven/Seabright, *Competition Policy and the Transformation of Central Europe*, 1996, pp. 174-176.

⁶ It has been argued that the effects of antitrust enforcement in the developed world are also not well understood. For two divergent conclusions on this issue, see Crandall/Winston, Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence, *Journal of Economic Perspectives* 17 (2003), p. 3 (23-24) and Baker, The Case for Antitrust Enforcement, *Journal of Economic Perspectives* 17 (2003), p. 27 (42).

effects worth the cost of having a domestic competition regime, or are there other less burdensome and more cost effective ways to achieve similar outcomes?

In this contribution, I explore the relationship between the enforcement of competition law and the pursuit of other policy goals related to economic development or social protection, perhaps somewhat provocatively, that these two cannot and should not be viewed as separate self-contained regimes. While the focus is on development policy, I will use a number of recent developments both in advanced and other jurisdictions to point towards this conclusion. In particular, I will argue that the distinctions between competition goals and more dynamic goals of government policy (such as innovation, economic development or the protection of social rights of certain groups) are being eroded as the conception of competition law, including in advanced jurisdictions, moves away from that of a legal instrument that protects a particular market structure or that supports an unqualified vision of private autonomy, prioritising atomistic decision-making and market interactions. Instead, competition law may increasingly be viewed as a tool for resolving the problems of industrial organization more generally⁷. Moreover, the problems that competition law seeks to address cannot be described along a single dimension, such as the size (or “bigness”) of firms, the opportunistic hold-up in relationships with specific investments, or even price fixing and collusion. Experience, evidence and theory have taught us that there may be good and bad reasons for, and outcomes from, both large firms and inter-firm collaboration.

The view presented in this contribution offers both an optimistic view about competition law as the “law of development” and reason for caution. To the extent that there is no distinction between competition goals and developmental goals, the trend towards the adoption of competition laws in the developing world is a salutary one. Competition law can be calibrated to the contextual policy goals or development needs of specific jurisdictions and does not need to take a back seat in the period of pursuit of development, so as to gain greater prominence in a “post-development” stage. And the point of caution relates precisely to this calibration. A richer conception of the goals of competition law implies a more varied panoply of tools through which to pursue them. In particular, when developing nations adopt a competition law they tend to import the existing templates or categories contained in the laws and administrative regimes of the advanced jurisdictions – anticompetitive agreements, some form of abuse of dominance and a merger control regime. But the meaning and significance of these categories has not been fixed and stable over time even in the mature regimes – certain aspects of anticompetitive conduct have been emphasized more at different times and in different industrial and production settings. Therefore, the importation of such categories may not be a good guide to the kinds of problems new adopters are likely to face and which of those are likely to be particularly salient to their own context and to the achievement of developmental objectives. Moreover, this kind of import may lead to early encrustations of analytical and decision-making routines for nascent antitrust authorities that may not be particularly useful, but that nonetheless become difficult to dislodge over time. In the absence of local tradition and accumulated knowledge and in an effort to mimic their colleagues from other jurisdictions, officials of newer authorities may establish a routinised approach to analysing problems and deciding cases or they may establish enforcement priorities that do not reflect the local development context. The challenge for those who promote competition enforcement in the developing world is to identify the salience of local competition problems and their relationship to developmental objectives, rather than to either speculate about competition law objectives at high levels of generality⁸ or to be wedded to established antitrust categories.

⁷ Svetiev, *Antitrust Governance: The New Wave of Antitrust*, Loyola University of Chicago Law Journal, 38 (2007), p. 593 (634).

⁸ ICN Unilateral Conduct Working Group, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-created Monopolies*, 2007, <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf> (last accessed 12 March 2012).

Competition Law and the Importance of Dynamics

Competition law as we know it today is the product of western industrialised nations. Mature antitrust jurisdictions, namely the US and the EU, have also been the principal proselytizers for the adoption of antitrust by other nations. In post-War period, US efforts to extend the reach of antitrust laws are well documented. The US advocated the adoption of antitrust laws, particularly among its European trading partners. For instance, the US was largely responsible for the implementation of a competition law in post-War West Germany and Japan, as well as the entrenchment of the competition provisions of the Treaty of Rome. US advocacy was consistent with the then regnant view of antitrust as a tool for maintaining a decentralised economy, which was also democracy-enforcing because of the link between the accumulation of economic and political power. Thus, the US imposition of antitrust laws on countries such as Germany or Japan, where pre-War totalitarian regimes had flourished, was not accidental⁹.

Apart from advocating or imposing the adoption of antitrust laws, the US also enforced its own antitrust laws extraterritorially, based on the effects doctrine, enforcement that once again, principally affected its key trading partners in Europe. Such extraterritorial extension of American values, through decisions of US litigants and courts, was resisted by the European nations. Their resistance was based, in part, on the interference of this type of enforcement with domestic policy-making with what we might call development objectives. In particular, arrangements among economic operators (including often competitors) may seem anticompetitive through the eyes of US courts and yet can be carefully calibrated arrangements among various social groups, often sponsored or supported by state policy, which seek to promote a balance of policy goals, including product quality and innovation, consumer protection, workable competition as well as stability in production and employment¹⁰.

While it was the US that was to a considerable extent responsible for the inclusion of the antitrust provisions at the establishment of the European Community, the EU is regarded today as the other principal competition regime in the world. More recently, the EU has been the jurisdiction at the forefront of efforts both to induce other nations to adopt domestic or regional competition laws and to create an international competition instrument. The EU has been particularly successful in such efforts for a number of reasons. First, the processes of association and enlargement of the EU have brought a number of jurisdictions directly under the purview of the EU competition regime. Secondly, rather than relying merely on extraterritorial enforcement, the EU has used its trading and economic relationships with other nations, as well as technical and other assistance, to induce them to adopt domestic laws or to subject them to some supranational obligations.

Despite these successes in bilateral settings, the EU failed in its efforts to include a competition instrument in the WTO agenda, as part of the package of the so-called Singapore issues. The US had never been particularly enthusiastic about being subjected to international antitrust rules more restrictive than its own, but it was developing nations that most strongly resisted the introduction of antitrust obligations in the WTO regime¹¹. Developing nations were concerned about the extent to which a relatively unfamiliar set of antitrust obligations would be used as a tool for asymmetric market access for industrialised nation products, while at the same time impeding their autonomy to implement policies pursuing developmental goals. An additional concern related to the balance of enforcement priorities of their domestic institutions if they become subject to an international antitrust instrument. To avoid the breaching of international obligations domestic authorities might have to prioritise conduct of interest to foreign economic operators, while at the same time not having the

⁹ Herrigel, *Industrial Constructions: The Sources of German Industrial Power*, 1996, pp. 139–140; Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, 1998, pp. 147–148.

¹⁰ Whitman, Consumerism versus Producerism: A Study in Comparative Law, *Yale Law Journal* 117 (2007), p. 340.

¹¹ McMahon, Developing countries and international competition law and policy, in: Faundez/Tan (eds.), *International Economic Law, Globalization and Developing Countries*, 2010, p. 252.

resources or capacity to impose obligations and remedies on conduct of multinationals that significantly impacts domestic firms and consumers. This only heightened the suspicion that antitrust could be used as another tool for the asymmetric opening of markets placing developing nations at a disadvantage.

The academic debate stirred by the trends towards the adoption of competition law and its internationalisation focused on the issue of whether developing nations needed a competition law at all and, if so, what kind. In an oft-cited contribution, Laffont expressed scepticism about such a need based on the view that “it is not always the case that competition should be encouraged in [developing] countries” given the structure of their economies¹². Furthermore, implementing a competition enforcement regime is both complex and costly, particularly in light of institutional and administrative weaknesses faced by those nations¹³. While in some cases competition enforcement might bring some benefits to developing nations, much of the benefits of competitive pressure could also be delivered through strictly enforced disciplines of international trade liberalization¹⁴. If the trading regime can guarantee access of imports to domestic markets, this can have the effect of disentrenching incumbent market power and disciplining domestic players.

Even at the conceptual level, the prescription that trade liberalisation is a sufficient substitute for competition enforcement faces two immediate shortcomings. The first is the fact that free trade does not in any way ensure competitive markets in non-tradeables, which may represent quite a significant share of the economy. The second is the fact that trade rules only impose obligations upon states and therefore can be circumvented by private arrangements seeking to block market access to foreign competitors, thus undoing the effects of trade liberalisation¹⁵.

Another set of arguments advanced more fundamental objections to the push for competition enforcement and an international competition instrument. For instance, in a number of contributions, Singh sought to justify the developing nations’ opposition to the EU proposal for a uniform competition instrument under the WTO umbrella, arguing that this was an ill-conceived idea that would disserve the interests of developing nations. Singh argued that any “one-size-fits all” instrument would not adequately deal with the heterogeneous circumstances and development needs of such nations¹⁶. Specifically, he argued that an emphasis on competition enforcement in developing nations may be premature and may in fact inhibit their capacity to pursue development objectives. Instead, he suggested that East Asian late industrialising economies, such as Japan and South Korea, offered a more appropriate template for the sequencing of different policy tools for nations facing development challenges¹⁷.

According to Singh, these economies did not emphasize competition enforcement in the stages of early industrialization, during which time development goals prevailed over competition goals. This

¹² Laffont, Competition, Information, and Development, in *Annual World Bank Conference on Development Economics*, 1998, p. 237.

¹³ Gerardin, Competition Law and Regional Economic Integration: An Analysis of the Southern Mediterranean Countries, World Bank Working Paper No. 35, 2004, pp. 24-26.

¹⁴ Gerardin, id, at p. 24.

¹⁵ In fact, there is also evidence that the disciplining effect of domestic competitors is much more potent than that of imports. Evenett, What is the relationship between competition law and policy and economic development, in: Brooks/Evenett (eds.), *Competition Policy and Development in Asia*, 2005, p. 1 (20).

¹⁶ Singh, Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions, Research papers for the Intergovernmental Group of Twenty-Four on International Monetary Affairs, No. 18, 2002, available at http://www.unctad.org/en/docs/gdsmdpbg2418_en.pdf (last accessed 12 March 2012), pp. 16, 19.

¹⁷ Singh, id, at p. 18; Singh, Multilateral Competition Policy and Economic Development A Developing Country Perspective on the European Community Proposals, Paper presented at the Fifth session of the Intergovernmental Group of Experts on Competition Law and Policy at Geneva, 2003, available at <http://www.networkideas.org/feathm/aug2003/MCP.pdf> (last accessed 12 March 2012), pp. 13-14.

also meant that industrial policy in these nations “dominated competition policy during their developmental phases i.e. if there was a conflict between the two, industrial policy prevailed”¹⁸. According to this view, while competition policy has static goals, such as reducing prices for consumers, industry policy has dynamic goals, such as increasing investment, which requires stable profits¹⁹. On Singh’s retelling of the relevant history, the state in these economies restricted imports and foreign investment, providing a captive market for domestic firms, which together with lax competition enforcement guaranteed high profits that could be used to “undertake high rates of investment, to improve the quality of their products, and ... to capture markets abroad”²⁰. It is only as development goals become achieved, with sufficient levels of industrial output and income per capita, that the state can begin to emphasize competition goals to ensure domestic competitive markets as a discipline on the now-established market players. In general, however, given the importance of dynamic (over static) efficiency for developing countries, coherence between policies will “involve competition policy being subordinated to the industrial policy during the course of economic development”²¹. In other words, competition law is not the law that leads to development, but instead premature enforcement of competition law may impede the achievement of developmental objectives.

Such a view of a trade-off between competition and development goals, finds some support in the competition law doctrines of advanced antitrust regimes as well. In the US for instance, the intensity of antitrust enforcement has varied to take account of changing economic circumstances²². However, even in times when the purpose of antitrust was viewed as broader and more open-ended, both judges²³ and commentators²⁴ stated, sometimes in quite emphatic terms, that in deciding antitrust cases the focus must remain on the goal of promoting competition and that courts cannot forsake the goal of competition for other policy goals. The implication of this position appears to be that other goals are to be pursued by targeted interventions. The narrowing of the goals of antitrust policy, inspired by the so-called Chicago revolution, to harm to consumer welfare through an increase in short run prices has only further exacerbated (at least conceptually) the compartmentalisation of competition policy in the US to static efficiency goals.

Similarly, in the EU the Treaty of Rome entrenched the competition provisions as foundational principles from the very beginning of the Community. At the same time, however, the Treaty provided an apparent outlet route in what is now Art. 101(3) TFEU, a provision which allows for some anticompetitive arrangements to be exempted from the operation of the Art. 101(1) prohibition, if the undertakings involved could establish the agreement or practice in question “contributes to improving the production or distribution of goods or to promoting technical or economic progress”. In the original implementation Regulation 17/62, the Commission (in the exercise of its administrative role) had the monopoly of granting such exemptions. Thus, while in the EU regime the trading off of goals was integrated into the competition decision-making, this methodology does reinforce the view that the pursuit of public policy goals relating to economic progress and development may justify the suppression of competition goals.

¹⁸ Singh, *Multilateral Competition Policy and Economic Development A Developing Country Perspective on the European Community Proposals*, Paper presented at the Fifth session of the Intergovernmental Group of Experts on Competition Law and Policy at Geneva, 2003, p. 16.

¹⁹ Singh, *id.*, at p.15.

²⁰ Singh, *id.*, at p. 20.

²¹ Singh, *id.*, at p. 24-25.

²² Crane, *Technocracy and Antitrust*, *Texas Law Review*, 86 (2008) 6, p. 1159 (1175-1176).

²³ USSC, *National Society of Professional Engineers v. United States*, (1978) 435 U.S. p. 679 (695) (“Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.”)

²⁴ Areeda, *Antitrust Law as Industrial Policy: Should Judges and Juries Make It?*, in: Jorde/Teece (eds.), *Antitrust, Innovation and Competitiveness*, 1992, p. 29 (32).

Much ink has been spilled on the question of the appropriate goals of competition policy and the range of views of different schools of antitrust thought to this issue. In some formulations, antitrust policy should be enforced without reference to outcomes. This approach emphasizes the autonomy of economic actors to make individual business decisions, absent agreements with or coercion from other traders or powerful firms. Favouring such a decentralised or atomistic economic landscape might be a value in itself, *pace* economic outcomes, and might also be beneficial to democracy if we believe that decentralised (as opposed to concentrated) economic power is incapable of dominating or completely capturing political processes. But then there are also clear potential benefits to cooperation and integration in modern economic life, particularly once we move beyond craft production destined for local buyers towards more complex industrial products that may have to be marketed to more distant markets. Autonomous decision-making by atomistic agents may be one value a community cares for (and this may not even be universally true across different communities), but there are many others, including not just lower prices, but also new and improved products, reduced poverty and malnourishment, sustainable exploitation of the local environment, improved access to water or public transport and so on.

The recognition that, in implementing competition law, various goals may need to be pursued simultaneously has at least three implications. First, it amplifies the problem caused by the absence of absolute markers that signal the need for competition intervention, such as firm size, market share, market structure or even types of conduct. Secondly, it makes decision-making multi-dimensional and therefore more complex. Finally, as a consequence of the first two, it puts an even greater strain on the institutions for implementation of law policy and this is precisely the area where developing economies often suffer from considerable weaknesses.

It is worth noting at this point that these problems are not limited to developing nations and have increasingly taken centre-stage in advanced competition regimes such as the US and the EU. In the US, the historical and ideological background to the antitrust laws, as well as their undifferentiated application through the generalist courts has made antitrust doctrine receptive to attempts to narrow the focus of interventions by essentially providing a safe harbour for conduct which is unlikely to produce an increase in consumer prices. While EU competition law has been more open to a heterodox interpretation of its purposes, in the inception the Treaty competition provisions were used quite instrumentally and quite narrowly to break down private barriers to the creation of the internal market. In other words, for a long time EU policy prioritised one particular type of competition namely cross-border competition that would challenge national systems of production and distribution.

More recently however, both of these mature regimes have had to deal with cases that challenge narrow conceptions of competition enforcement²⁵. The antitrust scrutiny of Microsoft's practices in the operating system and adjacent products, which had its iterations both in the US and the EU, placed enforcers and courts face-to-face with the production ecology of the new economy, characterized by on-going innovation, collaboration and information flows across firm boundaries. In particular, these cases brought to the fore the fact that the main forms of competition in these settings are dynamic, based not on price, but on the ability to deliver new and improved products to market. Moreover, rapidly changing technology strains the static tools of antitrust economics, by making product boundaries unstable and the sources of competitive threat matters of judgment rather than inference from current data²⁶.

The focus on innovation in such cases has had a number of implications for the implementation of competition law even in mature regimes. First, it puts in sharp relief the fact that even an efficiency based competition policy need not solely focus on static allocative efficiency, but also on dynamic efficiency, particularly given that dynamic change over time makes a far more important contribution

²⁵ Svetiev (n. 7) p. 593.

²⁶ Coyle, Discussion on "Competition Economics and Antitrust in Europe", *Economic Policy*, 21 (2006), p. 786, 787.

to economic growth and performance. Secondly, it suggests caution about short term prices as the sole criterion for competition intervention partly because competition can take place along many different dimensions²⁷, not only price. Moreover, certain aspects of products and services may take consumers (and other players in the regulation game, such as administrators or legislators) a longer time to learn about or appreciate as a relevant dimension.²⁸ Finally, such cases make it necessary to confront the non-linear (or networked) inter-firm relationships in the context of complex products and applications, in which there are intermingled both competitive and collaborative aspects and where innovation, production and distribution proceed continuously and simultaneously, rather than in stages²⁹.

To be able to respond to antitrust problems in a dynamic environment, the advanced regimes have also had to search for ways to relax the constraints of the standard implementation tools for competition law. The remedies implemented in both the US and the EU to deal with the Microsoft litigation put into place mechanisms through which to re-establish cooperation and ensure inter-operability in the markets under scrutiny and to remove bottlenecks to innovation. The difficulties of organising production based on collaboration between independent units are staple fare in the industrial organisation literature³⁰. Arguably, these interventions and remedies were not based either on an absolute distrust of business size or market concentration, nor on an absolute faith in business autonomy, but instead were attempts at solving concrete problems that arose in a particular production ecology. As such, antitrust or competition policy may be regarded as a more generic tool to resolve problems in industrial organization so as to advance the public interest³¹. It follows that in such settings the once (at least conceptually) firm line between competition policy and innovation policy tends to become blurred.

This brief detour into some recent examples of competition enforcement in advanced jurisdictions also sheds some light on the issue of the sequencing of policy implementation in developing nations. In particular, to achieve developmental objectives, do developing nations need to subsume the enforcement of competition laws to the implementation of industry policy? If it is true that the line between competition and industrial policy is being blurred by the focus on innovation and dynamic effects in competition enforcement in advanced regimes, it may be that developing nations need not be subject to this sequencing choice either. Unless of course we can argue that developing nations' circumstances are different justifying a different policy prescription. In the next section, I argue that

²⁷ Wright, Antitrust, Multidimensional Competition, and Innovation: Do We Have an Antitrust-Relevant Theory of Competition Now?, in: Manne/Wright (eds.), *Competition Policy and Patent Law under Uncertainty: Regulating Innovation*, 2011, p. 228.

²⁸ One example of this is the issue of consumer privacy in conduct and transactions over the Internet. Before there was widespread awareness of this issue among consumers, in analyzing the proposed merger between Google, Inc. and DoubleClick, Inc. on antitrust principles, the FTC recognized that the "acquisition raised concerns about consumer privacy in the online advertising marketplace that were not unique to the proposed merger". Rather than prohibiting the merger on this basis the FTC subsequently developed and released a "set of behavioral marketing principles that could be used by businesses" to protect online privacy. Federal Trade Commission, *The FTC in 2008: A Force for Consumers and Competition*, 2008, p. 4. Note that more recently, consumer privacy issues on the Internet have taken on a far greater significance as an aspect of competition. The change in Google's privacy policy at the beginning of 2012 triggered a vocal debate with one of its rivals Microsoft, about which company offered more robust privacy protection on the Internet, triggering a response from Google in which it compared the privacy policies of the principal Internet platforms. Microsoft slams Google user data policy in new ads, Sydney Morning Herald, 1 February 2012, available at <http://news.smh.com.au/breaking-news-technology/microsoft-slams-google-user-data-policy-in-new-ads-20120202-1qu3b.html> (last accessed 2 February 2012) (reporting on Microsoft's "Putting People First" advertising campaign).

²⁹ Jorde/Teece, Innovation, Cooperation, and Antitrust, in: Jorde/Teece (eds.), *Antitrust, Innovation and Competitiveness*, 1992, p. 47 (49); Mathews, *Strategizing, Disequilibrium and Profit*, 2006, p. 21.

³⁰ Alchian/Demsetz, Production, Information Costs, and Economic Organization, *American Economic Review*, 62 (1972) 5, p. 777.

³¹ Svetiev, (n. 7) p. 620, 634.

this is not the case by relying on both some contemporary arguments and a reference to the historical “templates” discussed by Singh.

Competition Law and Developmental Objectives

Apart from the controversies presented thus far, a number of arguments have been advanced in the literature about the ways in which competition law enforcement can assist developing nations in the attainment of their developmental objectives. Brusick and Evenett, for example, have pointed to the fact that abuses of dominance are frequently alleged in developing nations against firms that provide key infrastructure, such as energy, telecommunications, banking and transport, whether state-owned or private. To the extent that such conduct leads to higher prices and lower quality, this “negatively affect[s] the efficiency of exporters and producers downstream and hence act[s] as a break to development”³². Along a different dimension, McMahon highlights evidence that developing nations are disproportionately affected by international cartels, which raise price of staple commodities and can affect developmental goals both by hurting consumers directly and by raising costs of local producers and exporters³³. Finally, competition law can also be a tool with which to prise open local distribution channels, where they are foreclosed by powerful economic and political interests³⁴.

Note however, that none of the above cases need involve a conflict or a trade-off between the competition goals (even if limited to static efficiency goals) and the goals of development. Therefore, they are not inconsistent with Singh’s suggestion of subordinating competition policy to industry policy where a conflict arises. If there exists a competition law and an enforcement authority, the authority should proceed against such cases (assuming it has the possibility of implementing an effective remedy, which is a different issue altogether), since competition enforcement works synergistically with and supports industry policy.

But what about those cases where there is an apparent trade-off? In cases where in the sector that is supposed to provide the elevator for living standards through industrialisation and exports, the achievement of such a result requires protecting the prices and profits of local firms? It is precisely in those cases that Singh would suggest subordinating competition policy to industry policy. This is because the basis of the developmental strategy in the East Asian nations, according to Singh, was the use of domestic consumers as a captive market while firms in the industrialising sector build up scale, experience and knowledge to be able to capture and expand into exporting markets.

From the very outset, using such a policy prescription in many developing nations is faced with the problem that domestic markets may well be too small, both in absolute terms, but also specifically for the potential export, for this industrialization strategy to work. If one thinks of recent developers based on high technology products for example, such as Ireland or Israel, the information technology sector was from the very outset targeted to exports and the domestic market would have been relatively insufficient to be a springboard for growth. As such, allowing harm to domestic consumers through lax competition enforcement may well not translate into the achievement of development goals down the track.

Even more fundamentally, shielding the industrialising sector from imports was another key part of the successful strategies in the East Asian template as presented by Singh. Indeed, if the key is to protect prices and profits of domestic firms, there seems to be no point in lax competition enforcement domestically, if the industrialising or development sector is subject to competition from imports. But

³² Brusick/Evenett, Should Developing Countries Worry About Abuse of Dominant Power?, *Wisconsin Law Review*, 2008, p. 269 (280).

³³ McMahon, (n. 11).

³⁴ Fox, Economic Development, Poverty and Antitrust: The Other Path, *Southwestern Journal of Law and Trade in the Americas*, 13 (2007), p. 211 (213).

in a world where successive rounds of trade liberalisation have taken place over the last couple of decades and there are legal restrictions on raising protectionist barriers, it may not be feasible to implement an industrial policy that hinges critically on shielding domestic firms from imports for a period during which they can build-up competitive strength and perhaps recoup some of the outlays involved in the investments in industrial equipment.

Many in the development advocacy community have, consistently with Singh's arguments, raised their voices against the rash extension of competition policy to developing nations³⁵. But there have also been prominent voices supporting the view that credible implementation of competition and consumer protection laws in developing nations can make a meaningful and positive contribution to the achievement of development goals.

For instance, the Consumer Unity and Trust Society (CUTS) has a specific mission of extending competition and consumer protection laws and ensuring that they are effectively implemented in developing nations. CUTS is a non-governmental organisation, which seeks to advance development goals through the promotion of vibrant competition enforcement in developing nations. Among its missions with respect to competition and consumer protection, CUTS includes the following: "[p]romoting fair markets to enhance consumer welfare" and "enabl[ing] people, in particular women, to achieve their right to basic needs and sustainable development through a strong consumer movement"³⁶. As part of pursuing those missions, since 2003 CUTS has founded a Centre for Competition, Investment & Economic Regulation³⁷, which has initiated projects examining competition enforcement in a number of different sectors (healthcare, pharmaceuticals, sectoral regulation) and in different regions of the developing world (India, Africa etc)³⁸. As one CUTS official explained in an interview, the activities of CUTS are based on the premise that "healthy competition" can lead to "not only lower prices, better quality, better availability, but very importantly ... good governance"³⁹.

The approach followed by CUTS is to build bottom up support for competition policy enforcement, and this approach is animated by two related rationales. First, if a broader set of stakeholders, including movements promoting development goals and government authorities in general, perceive the benefits of competitive markets, it will also be easier for competition authorities to do their work. Secondly, in recognition that policy implementation and effectiveness is often the weak point in the developing world, CUTS aims to "build up that kind of awareness and that kind of a movement, which continues to pressurize the authorities ... to draft a law, adopt a law, including [to] go ahead implementing it". In other words, the aim is to contribute towards the creation of a "watch-dog" to ensure "that the law functions"⁴⁰. Thus, as opposed to the conditionality approach often followed by developing nations' foreign partners (including industrialized nations and donor organizations), organizations such as CUTS work to domesticate the competition enforcement regime, a key step for moving from the law on the books to law in action, as it builds internal support and monitoring for the implementation of competition policies.

This approach goes against the view that competition policy enforcement comes later in the sequence to industrialization policies promoting developmental goals. On that issue, the CUTS official specifically noted that even assuming this story of shielding domestic firms from competition

³⁵ Yu, Development Challenges Of Competition Policy in the Economic Partnership Agreements, 2007, available at http://www.acp-eu-trade.org/library/files/Yu_EN_190607_South-Centre_Development-challenges-of-Competition-policy-in-the-EPAs.pdf (last accessed 12 March, 2012).

³⁶ <http://cuts-international.org/Capability-December2009.pdf> (last accessed 12 March, 2012).

³⁷ <http://www.cuts-ccier.org/index.htm> (last accessed 12 March, 2012).

³⁸ http://www.cuts-ccier.org/Competition_Policy_and_Law.htm (last accessed 12 March, 2012).

³⁹ Interview with Official of the Consumer Unity and Trust Society (Zürich 3 June 2009).

⁴⁰ Ibid.

(domestic or foreign) as a form of industry policy presents an accurate depiction of the industrialization process in Japan and Korea, the problem is that “those times have gone” in light of the on-going trade liberalisation that has taken place already and the commitments that have been taken on within the WTO. From the development perspective, even if competition is not the sole force that promotes developmental goals, the CUTS collocutor suggested that there may well be lower awareness of the benefits from competition in many developing nations. This is because economic and personal or family affairs can often be related and deeply entwined⁴¹ or to use the words of Rodrik, because economic life often proceeds as part and parcel of “traditional entanglements”⁴².

Development Theory and Policy

Arguably, the challenge for development policy has always been to overcome different bottlenecks, whether industrial organisation, governance or social, to economic growth and progress, while simultaneously defining an appropriate role, if any, for the state in that process.⁴³ In other words, it is about fashioning a mix of mechanisms for the improved transformation of inputs to outputs and the appropriate distribution of the latter, so as to contribute towards an alleviation of poverty and an increase in various aspects of human development.

Traditionally, theorising about development was based on the view that developing nations were stuck in a low-growth equilibrium and debates focused on what kinds of policies a government could implement to escape that equilibrium⁴⁴. These debates had a largely macroeconomic focus. Thus, one view was that governments should promoting balanced growth by way of “a coordinated, broadly based investment program” in various sectors of the economy (or in Krugman’s words the “Big Push”)⁴⁵. The alternative view was that governments should focus on unbalanced growth, by promoting investment in a single sector that then sets off a further chain of upstream and downstream investments. In other words, government policy should promote investment in “a few key sectors with strong linkages, then moving on to other sectors” to correct the resulting imbalances⁴⁶.

As Rodrik has recounted, after a period of dormancy development theory subsequently turned neoclassical with an emphasis on microeconomic factors, and specifically relative prices as signals for economic activity that would produce economic development. This shift was both the result of the perceived lack of success of prior policies, changing intellectual fads, but it was also based on evidence that even in developing nations “investment decisions, agricultural production, exports [were] quite sensitive to price incentives”⁴⁷. In other words, during the 1980s development policy also turns neo-liberal, with a focus on price reform through liberalization and privatization programmes as a way of improving the micro signals to which economic actors must respond. Yet according to Rodrik, in a number of different settings this turn towards a focus on liberalization of price signals also had either unsatisfactory or disastrous consequences. In turn, such experiences “served to reveal the institutional underpinnings of market economies” and therefore “put institutions squarely on the

⁴¹ Ibid.

⁴² Rodrik, *Institutions for High-Quality Growth: What They Are and How to Acquire Them*, *Studies in Comparative International Development*, 35 (2000) 3, p. 3 (8).

⁴³ Krugman, *The Fall and Rise of Development Economics*, in: Rodwin/Schön (eds.), *Rethinking the Development Experience: Essays Provoked by the Work of Albert Hirschman*, 1994, p. 39, available at <http://web.mit.edu/krugman/www/dishpan.html> (last accessed 12 March 2012).

⁴⁴ Sabel, *Learning by Monitoring: The Institutions of Economic Development*, in: Smelser/Swedberg (eds.), *The Handbook of Economic Sociology*, 1994, p. 137.

⁴⁵ Krugman, (n. 43).

⁴⁶ Krugman, *ibid.*

⁴⁷ Rodrik, (n. 42) p. 4.

agenda of reformers”⁴⁸. This, of course, includes the enforcement of competition law, given the recognised failures associated with private monopoly, although it also included other kinds of sectoral regulation, supervision of financial and credit markets, as well as a broader focus on good governance by, for instance, limiting the opportunities for rent-seeking and corruption. Given the conditionality mindset of international development advisors and donors, these various regimes are often seen as self-contained boxes of regulation⁴⁹ that have to be “ticked” (ie, put in place) by developing nations. In other words, they are part of a set of pre-conditions that, when put in place, may unleash the development potential of poor countries.

Rodrik argues that production in poor countries is sensitive to price incentives, but only “as long as these are perceived to have some predictability”⁵⁰. We can think of the various regulatory regimes discussed above as mechanisms to ensure that price signals are not distorted and are more predictable; opportunities to respond to such signals by altering production decisions will not be foreclosed or expropriated by monopolists or monopsonists, or politically well-connected economic actors and so on.

But just as unleashing price signals is not a panacea, nor is ticking the boxes for enacted regulatory regimes. The first reason is obvious: formally adopting a regulatory regime and appointing a regulator does not guarantee that the regulator will function effectively in implementing regulation or that the regime will not be captured in some way by those whom it is meant to constrain. The second reason is less obvious: even an effective regulatory regime only removes a set of forces that might distort price signals or make them unstable. There are myriad reasons why prices may shift – a shift in preferences or technology, the emergence of an alternative source of supply. For local actors to make investments that favour growth, they need reliable and robust information on the basis of which to make decisions about where best to direct those investments and then how to continue to make those products that are valued in markets⁵¹.

In offering a way forward, we might seek to synthesize the various perspectives on the elaboration of development and competition policy. One is the notion that development is favoured by a coordinated “push” in investment⁵² based on the apparent common ground that “firms pursuing growth strategies together ... were more likely to succeed than firms in isolation”⁵³. According to Krugman, coordinated investment would be more likely to produce economies of scale and other externalities that would push the industry “over the threshold of profitability”⁵⁴. Along similar lines, Singh emphasizes the “coordination of investment activities” and argues that this was the “essential role of government” in the East Asian developers “during their developmental phase”⁵⁵.

But, as Sabel points out, apart from the coordination function there is also the task of acquiring and supplying the relevant information to those firms on what to produce and how.

On Singh’s view about the proper sequencing of competition law enforcement in the developing nation, the state plays the coordination function of stimulating investments by sheltering the firms in

⁴⁸ Rodrik, *ibid.*

⁴⁹ On the idea of self-sufficient regulatory regimes, see Micklitz, *The Visible Hand of European Regulatory Private Law*, *Yearbook of European Law* 28 (2009), p. 3 (55-58), also Micklitz/Patterson, *From the Nation State to the Market: The Evolution of EU Private Law*, unpublished manuscript, 2012.

⁵⁰ Rodrik, (n. 42) p. 4.

⁵¹ Sabel, (n. 44) p. 137.

⁵² Krugman, (n. 43).

⁵³ Sabel, (n. 44) p. 140.

⁵⁴ Krugman, (n. 43).

⁵⁵ Singh, (n. 17) p. 16.

the industrializing sector from competition allowing cartelization and protecting their profits⁵⁶. This, in turn, helps them to become internationally competitive exporters down the track. But this beneficial outcome would only result if the local firms take advantage of this sheltering in order to learn to produce that which world markets demand and to deliver such products at adequate quality and price levels. Alternatively, firms may take advantage of sheltering policies to protect their profits, while the expected export performance never materializes; which may be a much more familiar story. If improved export performance does not materialize, this could be either because the domestic firms failed to learn to produce well that for which there was market demand. But they could also argue that market circumstances have changed, and that the policy of sheltering needs to continue to allow the firms to adjust to new circumstances and so on.

To understand whether the policy of sheltering is working to achieve goals of industrialization or development and whether it needs to be continued or adjusted in some way, the government itself needs tools with which to evaluate those claims. In the absence of such tools, a policy of sheltering firms from competition and protecting their profitability can continue, imposing costs on local consumers and on the government budget without necessarily achieving improved export performance.

This brings us back to the issue of who supplies the information to the exporting sector as to which goods and how to produce them. One view might be that it is the state that must do this as part of the coordination function and this seems to be at least an unstated assumption of those who offer the export-led route to development of countries such as Japan or the East Asian tigers as a model for other developing nations to follow. But, as Sabel points out, such a view of the role of the state suggests at least three limitations in using this template for development. First, there is no reason in principle to believe that the state or the bureaucracy would have better access to such information as compared to firms⁵⁷. Secondly, even if the Japanese or the South Korean bureaucracy did for some reason have better access to such information, this may not be the case for many of the nations currently still stuck at a low levels of economic growth and development and at the same time facing serious governance and institutional limitations. Finally, even if this type of sheltering is appropriate, the state must also decide for how long to continue such a policy and when to end it, either if it is not bearing fruit or if it is no longer needed (particularly if it is also imposing costs on domestic consumers). Firms that benefit from the policy, after all, can seek to strategically supply information in an effort to continue the rents they receive from this policy, irrespective of whether they need it or they are indeed improving their productive and export performance.

Role of Associations, Strategic Contests, Stimulating Rivalry

It follows then that the state in the developmental context faces serious obstacles to acting as the key actor that steers the growth of export industries. It seems that the state has to stimulate the private sector to generate relevant knowledge that will enable private sector firms to produce goods that are valued and competitive in world markets and to ensure that such knowledge is also available to the administration so that it can evaluate the performance of the policy. Note that to achieve both of those purposes, it would seem preferable to foster a diversity of sources of such information or knowledge. If all firms were pursuing precisely the same strategy, the consequences of error would be disastrous. Moreover, it is much easier for the state to be captured by a unanimous view.

⁵⁶ Singh, *ibid.*

⁵⁷ Sabel points to evidence to suggest that even in Japan the state did not (*ex ante*) have privileged access to prescient information that would allow it to play the principal or dominant steering role in the process of industrialization and development and that the strategies initially sponsored by state institutions were not necessarily the ones that bore fruit in Japan's path to industrialization. Sabel, (n. 44) p. 150.

Authors have pointed in particular to the importance of associations of firms in the process of implementing export-led development policies in countries such as Japan, South Korea and Taiwan. Thus, in discussing the coordination role of the state, Sabel emphasizes not so much the protection of domestic firm profits, but the learning aspect and the diffusion of learning via sectoral associations of firms. Specifically, he notes that state bureaucracies would cede regulatory authority or grant various forms of aid or subsidies only where members of firm associations could demonstrate technical expertise, knowledge of market prospects as well as the capacity to generate knowledge about continuous and robust improvement in practices⁵⁸. This is neither a mere cartelisation policy to protect the profits of local firms, nor a typical national champions policy, where only one or a small number of firms are selected as the subjects of the state's support. Instead, a key function of such a sectoral associations is precisely to disseminate knowledge so as to improve the performance of all members, including those that might lag behind best practices⁵⁹. Importantly, knowledge generated in this way is also available to the bureaucracy as one way of ensuring that such associations do not subvert the public interest to that of the members.

This view of the coordinating role of the state, not as a protector of profits, but the facilitator of dynamic learning and the dissemination of best practices suggests that competition policy is not subordinated to, but integrated with developmental policy. Moreover, such a view of the relationship between competition law and development policy takes on an even greater significance in the current, even more globalised and disintegrated production context. As the interviewed CUTS official emphasised, nations must adjust developmental policies to the contemporary realities in trade and production⁶⁰. Increasing trade liberalization puts a constraint on purely protectionist policies. Even more fundamentally, trade liberalisation has led to the fragmentation of production processes, resulting in the emergence of global value chains or production networks⁶¹. For firms wishing to participate in those production networks, it is not necessarily scale that provides a key advantage, but flexibility and the ability to adapt to circumstances that can change quickly, which in turn requires an ability to learn quickly and to change course in response if needed. Firms from small developing nations with small markets may not be able to rely on cartelisation of domestic market and then wait to build up performance before seeking to access the international market and they may not need to. Instead, such firms can seek to plug into global production chains directly even at a relatively small scale. Yet, it would still be the case that accessing foreign opportunities could be done easier in concert with other firms, given the logic of externalities in production, and multiple opportunities for learning and sources of error-correction. Again, inter-firm coordination or information-sharing may also be sources for antitrust concern and such concerns could be legitimate. Competition policy need not be dormant; instead a dynamically minded competition policy would seek to understand whether learning and improved capacities to produce and participate into global production networks result from such practices or not.

In a study of developing strategies for late-developing nations, such as Ireland, Israel and Taiwan through their exploitation of opportunities in the IT industries, Breznitz points out that precisely the fragmentation in production globally provides “multiple entry points and ways to succeed” even within a single industry. Moreover given rapid rates of technological change, an export-led

⁵⁸ Along similar lines, Singh highlights the importance of maintaining strategic oligopolistic rivalry in the Japanese context, together with “investment races” and “contest based competition”, Singh, (n. 17) p. 20-21, though one should be careful not to jump to the conclusion that even a very “competent” state would be capable of divining an optimal market structure for achieving developmental objectives.

⁵⁹ Sabel, (n. 44) p. 151-152.

⁶⁰ A point also conceded by Singh, (n. 17) p. 23-24, who notes that “the focus of MITI’s work, its relationship with the competition agency and its instruments for persuading firms and industries to accept its proposals, have all changed with times and with the liberalization, globalization and other developments in the world economy”.

⁶¹ Breznitz, *Innovation and the State: Political Choice and Strategies for Growth in Israel, Taiwan and Ireland*, 2007, pp. 11-12.

development strategy could not rely on the state picking a sector and patiently waiting for selected firms to invest so as to achieve economies of scale and to efficiently supply an established and well-developed market by catching up to current technology⁶². In the IT industry, “the industry itself becomes the creation and rapid application of new technologies”⁶³.

In such a setting, the role and mode of state intervention to achieve developmental goals will need to adjust as well. Specifically, from the perspective of the role of competition policy vis-à-vis developmental goals, Breznitz suggests that the role of the state is to “motivate private companies to make long-term commitments to operate in rapid innovation-based industries”⁶⁴. Implementing such a policy, however, requires recognition that innovation is an “inherently collective endeavor”, which is both “iterative and cooperative in nature”. In other words, there is a need to coordinate activities across firm boundaries, and to motivate and facilitate learning (including joint learning) by such private firms. Again, the developmental state here faces a dilemma in that policies aimed at coordinating and motivating innovation and learning can also result in rent-seeking, capture, foreclosure, together with stagnancy and domestic consumer harm with little or no improved export performance. The role of the developmental bureaucracy then is more challenging, since just like industry players, it must be capable of implementing and revising policies in the face of on-going change⁶⁵. If industry players cooperate and use state incentives in a way in which improves their capability to innovate robustly and deliver products to market, they are advancing the goals of both development policy (economic growth and human development) and competition policy (in the form of dynamic efficiency). If on the other hand local firms simply lobby for state protection or subsidies and, under the pretext of cooperation, seek to foreclose entry and simply exploit domestic consumers, neither development nor competition goals are being achieved.

One challenge, particularly for states with weak governance structures, is how to best create the state institutions for such dynamically minded intervention. In the contexts he studies, Breznitz describes this as a process of industry-state co-evolution, whereby the (developmental) bureaucracy ends up “less Weberian”: more fragmented, less isolated and closer to industry⁶⁶. This observation squarely poses a set of questions about the creation of sectoral (or vertical) regimes with narrowly defined objectives as opposed to regimes with horizontal objectives that cut across sectors, such as developmental or competition bureaucracies. Dividing up oversight responsibilities does multiply sources of knowledge for the state, while perhaps making capture more difficult. At the same time having a number of different self-sufficient sectoral regimes or even regimes that cut across sectors, but with narrowly defined (intermediate) charges and little opportunity for exchange, can also mean that they end up impeding each other in the achievement of the ultimate objectives of development.

Formulating the argument in this way raises questions about the kind of advice provided by international donors and advisers about the creation of mechanisms for state intervention in developing nations. While that specific issue is beyond the scope of the paper, the argument as presented does suggest that effective regulatory mechanisms do not precede and “unleash”, but go hand in hand with improved economic performance for the development sector. Moreover, it lends support to the argument that harmonisation of international antitrust norms based on a thin consensus principle, such as a suspicion of horizontal coordination, could unwittingly foreclose mechanisms for building up the competitiveness of local firms and their capacity to plug into global production networks.

⁶² Breznitz, id, at p. 14-15.

⁶³ Breznitz, id, at p. 15.

⁶⁴ Breznitz, id, at p. 29.

⁶⁵ Breznitz, *ibid*.

⁶⁶ Breznitz, id, at p. 32.

Competition Law and the Fundamentals of Human Development

The discussion so far has followed the traditional debate on the interaction between development policy and competition law, namely focusing on the goal of development by stimulating the emergence of an industrial sector vis-à-vis traditional and subsistence activities in developing nations. To close the circle, in this section we focus on the recent interest in the use of competition policy for the advancement of more immediate human development objectives. One prominent example of such application of competition law was the case by the South African Competition Commission against pharmaceutical companies for their marketing practices for HIV medicines, based on theories such as excessive pricing or the denial of an essential facility⁶⁷. This is an instance in which rather than focusing on economic objectives, such as consumer welfare, or employment or innovation, competition policy can be used to more directly influence living conditions in the developing world by improving health standards and life expectancy⁶⁸.

Such a precedent has inspired thinking about the use of competition law in similar settings so as to improve access to basic necessities in developing nations. Specifically, in a briefing note the UN Special Rapporteur on the Right to Food has posed the question whether competition law should be used to address concentration and abuse of power problems in food supply chains as a way of promoting access to food and the fulfilment of the right to food in the developing world⁶⁹. Many farmers from the developing world supply primary agricultural commodities within global food supply chains, of the kind described in the previous section. As de Schutter notes, while both farmers and final consumers of primary agricultural commodities are numerous and dispersed, the participants in the middle steps of the supply chain (commodity buyers, food processors and retailers) tend to be considerably more concentrated. Such concentration gives these intermediate buyers the capacity to depress the prices of primary agricultural products, thereby lowering the incomes of farm producers in the developing world⁷⁰. Similarly, buyers such as retailers can seek to pass on costs of compliance with (often private) standards on hygiene or food safety. The combined effect of these reductions in the effective income for developing nation farmers is for them “to be kicked off” global supply chains, which in turn increases rural poverty and reduces access to food even for agricultural producers⁷¹.

The use of competition law to address this problem of so-called “buyer power”, according to de Schutter⁷², faces the limitation that modern competition regimes focus on the welfare of final consumers as an important, even a key variable in determining the existence of an antitrust violation. While practices by intermediary buyers directed at farmers may reduce the income of producers in the developing world, if this conduct leads to lower prices of products on supermarket shelves, it may well

⁶⁷ Monti, Unilateral Conduct: The Search for Global Standards, in: Ezrachi (ed.), *International Research Handbook on Competition Law*, forthcoming 2012.

⁶⁸ Note however that, in a concrete example of the integration of policy objectives, more recently a similar result with respect to a cancer drug was obtained in India through the patenting regime and the grant of a compulsory license under the Indian Patents Act. *Natco Pharma Limited v. Bayer Corporation*, Compulsory License Application No. 1/2011 (Controller of Patents Mumbai) available at http://www.ipindia.nic.in/ipoNew/compulsory_License_12032012.pdf (last accessed 12 March 2012).

⁶⁹ De Schutter, Addressing Concentration in Food Supply Chains: The Role of Competition Law in Tackling the Abuse of Buyer Power, Briefing Note No. 3, 2010.

⁷⁰ This problem is not limited to the developing world. Ganesh points out that similar issues have been investigated both in the UK and in the US. Ganesh, Right to Food and Buyer Power, *German Law Journal*, 11 (2010) 11, p. 1190-1191 available at http://www.germanlawjournal.com/pdfs/Vol11-No11/PDF_Vol_11_No_11_1190-1244_Articles_Ganesh.pdf (last accessed 12 March 2012). More recently the issue has received prominence in Australia. Battersby, Dob in your supermarket, ACCC tells suppliers, *Sydney Morning Herald*, February 21, 2012, available at <http://www.smh.com.au/business/dob-in-your-supermarket-acc-tells-suppliers-20120221-1tkaw.html> (last accessed 12 March 2012).

⁷¹ De Schutter, (n. 69) p. 2.

⁷² De Schutter, id, at p. 3.

enhance the welfare of final consumers, thus pitting the interests of rich nation consumers against poor nation farm producers. Both de Schutter and Ganesh⁷³ offer a number of suggestions as to how competition decision-makers and other bodies may seek to navigate that conflict, but for the purposes of the present discussion there are three key points worth noting in understanding the role that competition law could play in this aspect of economic development.

One suggestion in their analysis of food supply chain practices is that the high concentration of the intermediary stages in the chain allow cartelization by the buyers, namely joint concerted action to depress the prices received by developing nation farmers. However, such conduct would likely be caught under the antitrust laws of most mature regimes which typically prohibit any form of concerted action by competitors purely for the purpose of jointly fixing prices between competitors. Admittedly, if such a case was brought in the courts of an industrialised nation, where only final consumers are located, there may be an attempt to raise a jurisdictional issue based on the issue where the harmful effects of the conduct were suffered.

However, the second and more significant problem is that given the high degrees of concentration among intermediate agricultural buyers, as well as the weak market and bargaining power of the sellers (who tend to be small and dispersed farmers in the developing world), there would be no need for joint action or coordination for the buyers to depress prices. Instead, buyers can achieve the same outcome through unilateral action, which would not necessarily be caught by the competition laws of the developed regimes even if pursued by all buyers. A case based on a theory of abuse of dominance might face the obstacle of an absence of (final) consumer harm. More importantly, however, for competition law to intervene in this contracting matter between a buyer and seller, would essentially amount to a form of price regulation, if the mere aim were to maintain the income of the farmer (as a way of indirectly protecting her right to food). Such price regulation is problematic where the price has to be fixed by a government decision-maker in the context of a zero-sum conflict between the buyer and the farmer, since a higher price unequivocally hurts the buyer and helps the farmer. From the domestic perspective of developing nations, such protection of farm incomes attracts lobbying efforts and other forms of rent-seeking behaviour. From the global perspective, in the absence of some coordination across jurisdictions, the buyer can always threaten to go elsewhere in the face of such an effort at price control.

Yet, as De Schutter and Ganesh⁷⁴ recognize, there is a dynamic element to the buyer-supplier relationship even in the context of a traditional primary sector, such as farming or agriculture. For example, de Schutter points out that depressed incomes for developing nation farmers affect their ability to make investments for the future “and climb up the value chain”⁷⁵. Moreover, intermediate buyers who wish to place agricultural products for sale on western markets must comply with increasingly more strict requirements relating to “hygiene, food safety and traceability”, both of a public and private nature. Given requirements for traceability, such safety standards are impossible to satisfy without the cooperation of the farmer who produces the primary product. Therefore, the buyer must work together with the farmer/supplier to ensure that they too have the knowledge, capacity and the means to satisfy such regulatory requirements, absent which the buyer may be unable to resell those products on western markets or be potentially subject to crippling liability. Viewed in this way, we can see some similarity between the farming context and the firms in an industrialising sector that might require some policy support while and so long as they learn how to make that which is demanded on world markets. In other words, there is a way in which competition authorities may structure this discussion not purely through the prism of price regulation or income protection, but in a way that stimulates dynamic learning that can advance both the right to food of local producers (thereby furthering human development goals) and the ability of buyers to resell products on world

⁷³ Ganesh, (n. 70) p. 1190.

⁷⁴ Ganesh, id, at p. 1196.

⁷⁵ De Schutter, (n. 69) p. 1.

markets. While this might necessitate cooperation among local farmers, it can also contribute towards the maintenance of a disaggregated local economy, to the extent that it makes it unnecessary for foreign buyers to integrate downstream into larger agricultural holdings. If local farmers can ensure compliance with regulatory standards, continuing to buy from such decentralised farmers offers buyers greater flexibility in responding to demand shifts compared to owning the farming facilities themselves⁷⁶.

Presented in this way, in this example also it is not entirely clear where development or innovation policy ends and where competition law begins. Perhaps precisely for that reason, we might be wary about policy implementation or law enforcement efforts that are centered around traditional narrow mandate bureaucracies and private law courts. Instead, as in the cases presented by Breznitz, some type of “co-evolution” between the industry and the state is required. From the industry side, such institutional forms can involve consortia in which buyers help sub-contractors to develop capacities for resolving production problems⁷⁷. From the state side, we can recall Breznitz’s call for the state as a “flexible facilitating agent” and in that context a bureaucracy that is more fluid and flexible and closer to industry⁷⁸. Part of that flexibility might involve a bias against regulatory regimes that are too specialised and focused on intermediate goals such as competition or decentralization or price controls, without regard to how production relationships contribute towards the ultimate policy objective of improving the lot of the local population, alleviating poverty and hunger and increasing various aspects of human development.

In fashioning a development policy in the farming sector, an innovation policy logic would suggest stimulating some form of cooperation among local actors both to build capacity and to alleviate uncertainty associated with investments, but also stimulating problem-solving collaboration between local actors⁷⁹ and their foreign buyers so that they can meet the benchmarks of world markets. At the same time, a competition policy logic would urge caution about the potential effects of cooperative arrangements among local actors on both local new entrants and local consumers. Moreover, a competition policy logic might also urge caution about excessive dependence on a single product or crop, or excessive dependence on a single (or a very limited number of) foreign buyer(s)⁸⁰. A social policy or human rights logic would be attentive to the income levels received by local producers both as a source of sustenance and as a source of investments in maintaining or elevating their ability to produce the kinds of goods demanded in international production networks. It may well be both difficult and inadvisable to pursue these objectives in isolation or independently from each other.

This view echoes John Ruggie’s call for a more integrated framework to the pursuit of human development objectives as opposed to a “narrow approach to managing the business and human rights agenda”⁸¹, whereby regulatory efforts are confined within separate “conceptual and (typically weak)

⁷⁶ Compare, Ganesh, (n. 70) p. 1196, noting that costs of compliance with such standards led to the exclusion of small farmers in Kenya and a tendency towards larger farms owned by exporters.

⁷⁷ Whitford/Zeitlin, *Governing Decentralized Production: Institutions, Public Policy, and the Prospects for Inter-Firm Collaboration in the US*, Industry & Innovation 11 (2004), p. 11.

⁷⁸ Breznitz, (n. 61) p. 29, 32. Such a view of bureaucracy obviously presents a serious challenge to traditional public law visions of rigid procedures and formal hierarchies as the form of control of administrative action. But this simply presents a challenge to be overcome to the extent that we are not forced to choose between the bureaucracy’s efficacy and its accountability.

⁷⁹ It would be difficult for a single farmer to guarantee the safety of agricultural commodities from pests or diseases without the cooperation of neighbouring farmers.

⁸⁰ Sabel points to evidence that Japanese subcontractors typically sought to avoid being dependent on a single buyer, by spreading their activities across different industries and groups, while at the same time avoiding dependence on a single bank as a source of credit. Sabel, (n. 44) p. 146.

⁸¹ Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises,

institutional box(es)⁸² each pursuing a narrow mandate or logic of its own. The co-evolving state and private sector institutions, on this view, must face policy trade-offs – as best as they can – as these trade-offs are presented, rather than leaving outcomes to fall out as imperceptible adjustments over the longer term to interventions guided by the logic of different regulatory or sectoral regimes.

Institutions, Categories and Routines

One implication of this contribution is the argument that the relationship between development and competition policy cannot be adequately captured either by idea of subordination (of the latter to the earlier) nor by compartmentalization of narrow mandate regimes. Instead, I have argued that development policy cannot and should not be designed in isolation from competition law considerations and vice-versa. Competition law seeks to influence the modalities of production and distribution of goods and services in the economy, with the aim of both increasing the size of the pie (over time) and influencing how the pie is ultimately shared. The modes of production in the economy also influence developmental goals, such as industrialization, the ability to take part in world production networks and the take home rewards for producers. Competition policy aimed at atomized production relationships can undermine such goals. At the same time, development policy that aims to promote cooperation and shield firm investments from some uncertainty can be captured by concentrated local economic and political interests, this again at the expense of developmental goals. While we might agree with Singh that competition policy must take into account dynamic effects, this does not mean that competition policy plays second fiddle in the developmental stage.

Based on the foregoing, it is encouraging that developing nations in the past few decades, either of their own accord or instigated by international donors or partners, have been adopting competition regimes and building implementation capacity in this field. It is also encouraging that a number of different international fora have provided focused settings for discussion of competition policy problems, including not only the initiatives within the OECD and UNCTAD, but also more recently the ICN, as a dedicated competition forum (“all antitrust, all of the time” as explained by one of its promoters)⁸³. Importantly, apart from discussions about common problems, implementation strategies and enforcement cooperation, these fora also have a specific focus on the building up of regulatory capacities of decision-makers within emerging and developing economies.

However, despite this increased attention to competition law issues within a variety of settings, there is an emergent consensus that these international fora do not provide a sufficiently focused exploration of the relationship between developmental goals and competition problems or competition law implementation. In noting the paucity of specific initiatives within the ICN to address development related competition issues, Monti observes that in the realm of rules on unilateral conduct (or abuse of dominance) “the sole [ICN] effort devoted specifically to the needs of developing and transition economies is a document on recommended practices on state-created monopolies” with relatively unhelpful exhortations⁸⁴. Elsewhere I have argued that discussions at the annual ICN conferences are not always focused on topics that are of relevance to a broad range of member authorities from developing nations, nor are they conducted in a way that gives voice to the specific problems and experiences of such authorities⁸⁵. With respect to UNCTAD, Monti observes that the norms elaborated within that much older competition forum, beginning with the ‘Set of Multilaterally Agreed

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A/HRC/8/5, 2008, available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (last accessed 12 March 2012), p. 8.

⁸² On this point, see also Ganesh, (n. 70) p. 1227-1228.

⁸³ James, Reconciling Divergent Enforcement Policies: Where Do We Go From Here?, in: Hawk (ed.), *International Antitrust Law & Policy*: 2001 Fordham Corporate Law Institute, 2002, p. 1 (5).

⁸⁴ Monti, (n. 67).

⁸⁵ Svetiev, Part I of this Working Paper.

Equitable Principles and Rules for the Control of Restrictive Business Practices' from 1980 and up to the Model Law released in 2003 and revised in 2010, do not appear to have evolved much in that period. Moreover these normative documents contain few, if any, accommodations or specific modifications tailored to the development context⁸⁶. While it may be that the UNCTAD competition conference does a better job at giving voice to developing nation problems and experiences⁸⁷, a relatively recent report by the UNCTAD Secretariat on abuse of dominance contains a limited number of concrete "examples of competition enforcement contributing to development"⁸⁸.

These limitations reflect a wider problem with international antitrust cooperation instruments, namely the tendency for guidance to new jurisdictions (whether through model rules of fora such as the ICN, UNCTAD or the OECD or through projects sponsored by donors and partners such as the World Bank or the EU) to be organised around existing antitrust categories that have emerged in different circumstances in mature regimes (ie, the US and EU). Moreover, such guidance, being focused narrowly on competition aspects, may not address some of the issues raised in this paper. This in turn can lead officials from developing nations to view their world through those categories, influencing in turn how they normatively perceive their local experiences and examples. To take one example, Brusick and Evenett argue that most of the advice from industrialised-country experts to "nascent" competition authorities in the developing world is to give preference to actions against cartels (or horizontal restraints among competitors) and competition advocacy⁸⁹. Hearing it repeated over-and-over again that cartels are the bane of antitrust, how does a competition official fine-tune his competition advocacy message relating to development or exporting clusters of firms of the kind mentioned earlier in this article?

There is another way in which such category based guidance from industrialized country experts can limit the ability of competition decision-makers to learn to respond to their local development context and goals, namely by encrusting decision-making procedures and establishing analytical routines. From the domain of decision-making procedures, one example is the tendency to view competition enforcement as the establishment of violations and liability that is to be decided by a courts or a similar adjudicative tribunal.⁹⁰ Similarly, expert guidance may lead to the establishment of certain analytical routines within nascent antitrust authorities, such as market definition, the use of the SSNIP test and so on, without any discussion or appreciation of how, if at all, these relate to the development context and objectives⁹¹. Such tendencies might both rigidify and isolate the antitrust regime, impair communication across different areas of state intervention and, as a result, constrain precisely the type of flexible state-industry co-evolution that may be necessary to respond to development objectives and contexts.

⁸⁶ Monti, (n. 67).

⁸⁷ In an interview with an official of the Consumer Unity and Trust Society, an NGO that has been operating to promote competition and consumer protection regulation in the developing world, he observed that UNCTAD has a "larger developing country focus". Rather than their output, the official emphasized that the UNCTAD annual conference on competition is "smaller" than the ICN meeting and "dominated by developing country authorities", which meant that "the exchange of experiences and thoughts are much better". Interview with Official of the Consumer Unity and Trust Society (Zürich 3 June 2009).

⁸⁸ UNCTAD, Abuse of Dominance, TD/B/COM.2/CLP/66, 2008, p. 12.

⁸⁹ Brusick/Evenett, (n. 32) p. 271.

⁹⁰ Svetiev, (n. 7) p. 597-599. In the context of the discussion of this paper, particularly notable is the apparently emerging consensus to assign cartel offenses criminal liability.

⁹¹ Tools of static analysis provide a framework for the step-wise breaking down of an antitrust problem and an apparently systematic method of analyzing it, but as Coyle has observed they are not particularly useful or relevant in settings where unpredictable dynamics are important. Coyle, (n. 26) p. 787.

Concluding Remarks

Development theory in its inception tended to offer quite broad prescriptions about policy – starting from the belief in macroeconomic demand management policies (and their analogues in the development context) to the belief that unleashing price signals is a panacea for achieving economic and human development. The failures of such broad-brush prescriptions, together with evidence that successful developers did not fit neatly into existing categories has brought closer attention to both the “institutional underpinnings” of market economies and to the role that the state could play in facilitating private economic action. Regulatory regimes such as competition law or financial regulation are now firmly on the agenda of international development donors and, as a result, also on the books in many developing nations. Yet, particularly given the conditionality mindset of donors, these regulatory regimes tend to be viewed as boxes to be ticked in return for continued support. As a result they are often implemented independently from each other, as self-sufficient regimes with narrow mandates and specialised bureaucracies, and without consideration of what role they can play in the fashioning and implementation of development policy. In such a setting, it may well be legitimate to ask whether a developing nation should prioritise developmental policies over the enforcement of competition law during the developmental stage if there is a conflict between those two regimes in a particular case.

By pointing to the growing recognition of the need to take account of dynamic effects in competition law and by seeking to identify the common ground in the various interpretations of the successes of the late developers in East Asia, this contribution has argued that the boundary between development policy and competition law is quite porous. If firms in a development sector need to coordinate their decision-making, the decision-maker needs to understand why such a need arises. An exporting cartel is not likely to be a successful strategy given that producers in developing nations tend to be price-takers in world markets. A cartel aimed at domestic consumers purely to protect profits and prices of domestic firms would ordinarily be treated with some scepticism, or at the very least the policy-maker might seek to understand if other alternatives are available to deliver dynamic benefits over time. The need for learning spillovers across firm boundaries might be treated as a legitimate objective, but even here the policy-maker would need to learn herself so as to understand whether firms are indeed improving their capacity to participate in world markets, or whether the coordination is, or becomes, a guise for collusive conduct. The challenge then for nascent authorities, donors, advisers and international antitrust fora is not simply to build isolated competition enforcement systems based on familiar categories, but to contribute to the process of industry co-evolution with all aspects of state intervention, allowing competition (and other) considerations to be appropriately integrated into policies aiming to facilitate economic development and other broader social goals.



This EUI Working Paper is published in the framework of an ERC-funded project hosted at the European University Institute.